89-106

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

DEXTER C. POSS, SR., Individually
and as Administrator and Personal
Representative of the Estate of
DEXTER C. POSS, JR., Deceased,
and MARY JO POSS, Individually,

Petitioners,

v.

KENNETH A. AZAR, M.D.,
WILLIAM B. SWAN, SHERIFF,
COUNTY OF McDUFFIE, GEORGIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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July 17, 1989

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QUESTIONS PRESENTED

1. Whether a government psychiatrist directly in charge of an involuntarily committed patient and with final policy making authority over that hospital's facility may shield himself through federal qualified immunity from a Section 1983 claim based upon the Fourteenth Amendment right to reasonable and adequate medical care, despite material facts in evidence regarding the psychiatrist's deliberate refusal to provide medical care to and release of the patient hours after the patient's admission for a suicide attempt, over the objections of the patient's parent, and in the face of three previous physicians' diagnoses that the patient posed an imminent risk of harm to himself?

2. Whether a government psychiatrist in Georgia may shield himself with state governmental immunity from pendant state tort claims, even though the Georgia Supreme court has held state governmental immunity is unavailable in actions brought by or on behalf of the patient, inapplicable where the claims concern the inadequacy of treatment, and waived when there is present the very type of insurance held by the respondent in this case?

3. Whether a county sheriff who directly ordered and participated in the arrest of one he knew to be a suicide risk, but who did not search the arrestee or direct the other arresting officers to do so, did not monitor the arrestee once placed in a jail cell or direct others to do so, did not inform the other arresting officers or jail personnel that the arrestee was a suicide risk, and had neither established any policy nor provided any training to enable his officers or jailors to recognize and handle suicide risks despite earlier instances, is entitled to a directed verdict in a Section 1983 action based upon the arrestee's Fourth Amendment right to reasonable arrest as well

as the arrestee's Fourteenth Amendment rights to safety and to reasonable and adequate medical care?

4. Whether a county, whose law enforcement official with final policy making authority is the sheriff, is entitled to a directed verdict even though there are material facts in evidence demonstrating that the sheriff's official actions resulted in constitutional deprivations?

LIST OF PARTIES

Parties

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Dexter, C. Poss, Sr.
Mary Jo Poss
Kenneth A. Azar, M.D.
William B. Swan, Sheriff
County of McDuffie, Georgia

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Cherokee Insurance Company
Transit Casualty Insurance Company
Missouri Insurance Company
Holland American Insurance Company
Gibraltar Insurance Company

Manhattan Fire Insurance Company
Centaur Insurance Company
Twin City Fire Insurance Company
American Excess Insurance Company

TABLE OF CONTENTS

Page No.

QUESTIONS PRESENTED i

LIST OF PARTIES iii

TABLE OF AUTHORITIES viii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 11

I. THE DECISION OF THE COURT BELOW REGARDING A GOVERNMENT PHYSICIAN'S FEDERAL QUALIFIED IMMUNITY IS IN CONFLICT WITH THE DECISIONS OF THIS COURT, THE DECISIONS OF OTHER CIRCUITS, AND OTHER DECISIONS OF THE ELEVENTH CIRCUIT ITSELF 11

II. THE DECISION OF THE COURT BELOW REGARDING A GOVERNMENT PHYSICIAN'S STATE IMMUNITY IS IN CONFLICT WITH THE DECISIONS OF THE GEORGIA SUPREME COURT 21

III. THE DECISION OF THE COURT BELOW REGARDING THE BURDEN OF PROOF FOR A CONSTITUTIONAL DEPRIVATION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT, THE DECISIONS OF OTHER CIRCUITS, AND OTHER DECISIONS OF THE ELEVENTH CIRCUIT ITSELF 24

IV. THE DECISION OF THE COURT BELOW REGARDING THE LIABILITY OF A COUNTY FOR THE ACTIONS OF ITS OFFICIAL WITH FINAL POLICY MAKING AUTHORITY IS IN CONFLICT WITH THE DECISIONS OF THIS COURT, THE DECISIONS OF THE OTHER CIRCUITS, AND OTHER DECISIONS OF THE ELEVENTH CIRCUIT ITSELF 29

CONCLUSION 31

APPENDIX A.
Opinion of the District Court Ruling On Respondents Swan's and County Of McDuffie's Motion For Summary Judgment 1a

APPENDIX B.
Opinion of the District Court Ruling On Respondent Azar's Motion For Summary Judgment 3a

APPENDIX C.
Opinion of the District Court Ruling On Respondent Azar's Motion To Dismiss 13a

APPENDIX D.
Opinion of the District Court Ruling On Petitioners' Motion For Reconsideration 19a

APPENDIX E.
Judgment and Order of the District Court Ruling On Respondents County of McDuffie and William B. Swan's Motion For Directed Verdict 21a

APPENDIX F.
Opinion of the District Court Ruling
On Petitoners' Motion To Substitute Parties 23a

APPENDIX G
Order of the Court of Appeals Ruling
On Petitioners' Motion To Certify Pendant State
Tort Claim Issue To The Georgia Supreme Court 25a

APPENDIX H.
Judgment of the Court of Appeals 27a

APPENDIX I.
Judgment of the Court of Appeals Issued
As Mandate 29a

APPENDIX J.
Citations To Record Of Material Facts
In Dispute Regarding Claims Against
Respondent Azar 31a

TABLE OF AUTHORITIES

CASES — PAGES

Alman Bros. Farms & Feed Mill, Inc. v. Diamond Lab, Inc., 437 F.2d 1295 (5th Cir. 1971) 10

Anderson v. City of Atlanta, 778 F.2d 678 (11th Cir. 1985) 29

Bee v. Greaves, 744 F.2d 1387 (1984), *cert. denied* 84 L.Ed.2d 334, 105 S.Ct. 1187 15

Bell v. Wolfish, 439 U.S. 816, 58 L.Ed.2d 107, 99 S.Ct. 76 (1979) 14

Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977) 14, 15

Carroll v. Wilkerson, 782 F.2d 44 (6th Cir. 1986) 29

Colburn v. Upper Darby Township, 838 F.2d 773 (3rd Cir. 1988) 26, 28

Cooper v. Swofford, 258 Ga. 149, 368 S.E.2d 518 (1988). 22, 24

Daniels v. Williams, 474 U.S. 327, 88 L.Ed 2d 662, 106 S. Ct. 663 (1986) 16, 31

Edwards v. Gilbert, 867 F.2d 1271 (11th Cir. 1989) 16

Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978) 13

Guglielmoni v. Alexander, 583 F. Supp 821 (D. Conn. 1984) 12, 14

Harlow v. Fitzgerald, 457 U.S. 800, 73 L.Ed. 2d 396, 102 S. Ct. 2727 (1982) 11, 12, 15

Hennessy v. Webb, 245 Ga. 329, 264 S.E.2d 878 (1980) 23

Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3rd Cir. 1979) 14

Jackson v. Miller, 176 Ga. App. 220, 335 S.E.2d 438 (1986) 22

Johnson v. Bullard, 644 F.Supp. 333 (N.D. Ga. 1986) 29

Marchese v. Lucas, 758 F.2d 181 (6th Cir. 1983) 29

Martin v. Georgia Department of Public Safety, 257 Ga. 280, 357 S.E 2d 569 (1987) 23

Matje v. Leis, 571 F.Supp. 918 (S.D. Ohio 1983) 26

Monell v. Department of Social Services, 436 U.S. 658, 56 L.Ed.2d 611, 98 S. Ct. 2018 (1978) 12, 29

Morrison v. Washington County, Alabama, 700 F.2d 678 (11th Cir. 1983) 15

O'Conner v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975) 13

Osterneck v. E.T. Barwick Industries, Inc., 79 F.R.D. 47, (N.D. Ga. 1979) 10

Owens v. City of Atlanta, 780 F.2d 1564 (11th Cir. 1986) 26

Partridge v. Two Unknown Police Officers of Houston, 751 F.2d 1448, *withdrawn*, 755 F.2d 1126, *substitute opinion*, 791 F.2d 1182 (5th Cir. 1986) 14, 28

Patterson v. Fuller, 654 F. Supp. 418 (N.D. Ga. 1987) 26, 31

Pembaur v. City of Cincinnati, 475 U.S. 469, 89 L.Ed.2d 452, 106 S. Ct. 292 (1986) 12, 29, 32

Rogers v. Evans, 792 F.2d 1052 (11th Cir. 1986) 15

Society For Goodwill To Children, Inc. v. Cuomo, 737 F.2d 1239 (2d. Cir. 1984) 13

Swofford v. Cooper, 184 Ga. App. 50, 360 S.E.2d 143 (1987) 22

Waldrop v. Evans, 681 F. Supp. 840 (M.D. Ga. 1988) 15

Williams v. City of Valdosta, 689 F.2d 964 (11th Cir. 1982) 29

Wilson v. Taylor, 733 F.2d 1539 (11th Cir. 1984) 29

Woodall v. Foti, 648 F.2d 268 (5th Cir.) 14

Youngberg v. Romeo, 457 U.S. 307, 73 L.Ed.2d 28, 102 S. Ct. 2452 (1982) 13, 14, 15

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., amend. IV 3

U.S. Const., amend. XIV, § 1 3

28 U.S.C. § 1254(1) 2, 3

42 U.S.C. § 1983 ..... 2, 4, 6

O.C.G.A. §§ 37-3-4, 37-7-43, 37-7-64, and 37-7-91 (1981) 4, 17, 21, 22, 23

O.C.G.A. § 40-6-6 (1981) 23

OTHER AUTHORITIES

Fed. R. Civ. P., Rules 50 and 56(c) 10

1969 Georgia Op. Att'y Gen. No. 69-49 23

Rule 37 of the Georgia Supreme Court 24

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Dexter C. Poss, Sr., individually and as administrator and personal representative of the estate of Dexter C. Poss, Jr., deceased, and Mary Jo Poss, individually, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on April 17, 1989.

OPINIONS BELOW

The opinions of the United States District Court for the Southern District of Georgia which are not reported, are reprinted in Appendices A, and C through F, *infra*. The opinion of the United States District Court for the Southern District of Georgia which was published is reported at 676 F. Supp. 258, and is reprinted in Appendix B, *infra*.

The opinions of the Court of Appeals for the Eleventh Circuit are not reported, but are reprinted in the Appendices G through I, *infra*.

JURISDICTION

This action alleging violations of 42 U.S.C. § 1983, was brought in the United States District Court for the Southern District of Georgia on June 7, 1985. Subject matter jurisdiction was based on 28 U.S.C. § 1331.

On June 25, 1987, the district court denied respondent County of McDuffie's motion for summary judgment. *See* Appendix A, *infra*.

On December 3, 1987, the district court granted respondent Azar's motion for summary judgment addressing only the pendant state tort claims. *See* Appendix B, *infra*.

On March 25, 1988, the district court granted respondent Azar's motion to dismiss. *See* Appendix C, *infra*.

On April 15, 1988, the district court denied petitioners' motion for reconsideration. *See* Appendix D, *infra*.

On April 27, 1988, the district court granted respondents Swan's and County of McDuffie's motion for directed verdict. *See* Appendix E, *infra*.

On May 25, 1988, the district court granted petitioners' motion to substitute Georgia Regional Hospital at Augusta for Georgia Department of Human Resources *nunc pro tunc* as of March 7, 1988. *See* Appendix F, *infra*.

On April 17, 1989, the Eleventh Circuit affirmed the district court in an unpublished decision and without issuing an opinion (Appendix G, *infra*), and denied petitioners' motion to certify pendant state claims to the Georgia Supreme Court (Appendix H, *infra*).

On May 8, 1989, the Eleventh Circuit issued a mandate that costs be taxed against the petitioners. *See* Appendix I, *infra*.

Jurisdiction of the Supreme Court to review the judgment of the Eleventh Circuit exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment of the United States Constitution, U.S. Const., amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment of the United States Constitution, U.S. Const., amend. XIV, § 1, provides:

> All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of the Civil Rights Act, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 37 of the Georgia Code, O.C.G.A. § 37-3-4 (1981), provides:

> Any physician, psychologist, peace officer, attorney, or health official, or any hospital official, agent, or other person employed by a private hospital, or at a facility operated by the State, by a political subdivision of the State, or by a hospital authority created pursuant to Article 4 of Chapter 7 of Title 31, who acts in good faith in compliance with the admission and discharge provisions of this Chap-

ter shall be immune from civil or criminal liability for his actions in connection with the admission of a patient to a facility or the discharge of a patient from a facility.

STATEMENT OF THE CASE

Procedural Background

The complaint in this action was filed on June 7, 1985 by Dexter C. Poss, Sr. and Mary Jo Poss, individually as parents of Dexter C. Poss, Jr., and Dexter C. Poss, Sr., as personal representative and administrator of the Estate of Dexter C. Poss, Jr.

There were essentially two sets of defendants, one being the government medical defendants and the other being the law enforcement defendants. The federal claims against Georgia Regional Hospital at Augusta (Georgia Department of Human Resources) and respondent Kenneth A. Azar, M.D. concerned violations of Dexter C. Poss, Jr.'s Fourteenth Amendment right to reasonable and adequate medical care. The federal claims against defendants City of Thomson, Thomson police chief Jack G. Garrison, Thomson police officer Frederick Newsome, Jr., Thomson police officer Arthur T. Greene, McDuffie County, and McDuffie County Sheriff William B. Swan involved violations of Dexter C. Poss, Jr.'s Fourth Amendment right to reasonable arrest and Fourteenth Amendment right to reasonable and adequate medical care. There were pendant state tort claims for all Defendants.

On April 2, 1987, respondent McDuffie County filed a motion for summary judgment contending that the respondent McDuffie

County was not liable under 42 U.S.C. § 1983 for the acts of its sheriff, respondent Swan. The district court denied respondent McDuffie County's motion for summary judgment on June 25, 1987.

On June 3, 1987, Georgia Regional Hospital and Kenneth A. Azar, M.D. filed a motion for summary judgment expressly addressing only the petitioners' pendant state tort claims. On December 3, 1987, the district court denied Georgia Regional Hospital at Augusta's motion for summary judgment, but granted respondent Kenneth A. Azar, M.D.'s motion for summary judgment at least with regard to petitioners' pendant state tort claims. The order was silent as to the federal civil rights allegations.

The consolidated pretrial order was entered on March 2, 1988.

Also on March 2, 1988, petitioners requested leave to file their motion to amend complaint to substitute Georgia Department of Human Resources for Georgia Regional Hospital at Augusta. On March 7, 1988, the district court granted petitioners' leave to file motion to amend complaint substituting Georgia Department of Human Resources for Georgia Regional Hospital at Augusta. Later, on May 25, 1988, the court granted petitioners' motion to substitute those parties *nunc pro tunc* as of March 7, 1988.

During the pretrial conference of March 4, 1988, the court granted Georgia Department of Human Resources and respondent Kenneth A. Azar leave to allow them to file their motions to dismiss. On March 11, 1988, petitioners filed their responsive brief and respondents filed a supplemental brief. The district court ruled in both Georgia Department of Human Resource's and respondent Azar's favor on March 25, 1988, and denied petitioners' motion for reconsideration on April 15, 1988.

On March 22, 1988, the City of Thomson defendants and petitioners entered into a covenant not to sue. Subsequently, said defendants were voluntarily dismissed from the suit.

On April 18, 1988, the jury trial began. At the conclusion of petitioners' case, respondents McDuffie County and Swan moved for a directed verdict. Said motion was granted by the district court on April 19, 1988 and the judgment was entered on that order on April 27, 1988.

On April 17, 1989, the Eleventh Circuit affirmed the district court's grant of respondent Azar's motion for summary judgment and motion to dismiss as well as affirmed the district court's grant of respondent Swan's and respondent McDuffie County's motion for directed verdict. The Eleventh Circuit also denied on April 17, 1989 petitioners' motion to certify to the Georgia Supreme Court the pendant state claims against respondent Azar.

Statement of Facts

On October 15, 1984 at approximately 2:00 p.m., petitioners' 24 year old son Dexter Cicero "Cy" Poss, Jr. was discovered by his grandmother Myra Lee Bush in his apartment after having tried to kill himself by taking an overdose of approximately twenty-five (25) Dalmane pills. R9-46; Deposition of Myra Lee Bush, pp. 10-13. Unable to wake Cy, Mrs. Bush contacted the McDuffie County Sheriff/Thomson City Police Officers about the suicide attempt. *Id.*

McDuffie County and Thomson City officers went out to the apartment and they transported Cy in his somnolent condition to McDuffie County Hospital. R9-46-49, 249. Respondent Swan, the McDuffie County Sheriff, also went out to the McDuffie County Hospital to look into the matter that night. R9-54, 248.

Cy Poss was next transported to the VA hospital and then, after a violent struggle with several police officers, on to Georgia Regional Hospital at Augusta. Deposition of Dr. Harold Morgan, p. 26; Deposition of Dexter C. Poss, Sr., p. 25; Deposition of Myra Lee Bush, pp. 16 and 17; Deposition of Dr. Robert B. Gottschalk, pp. 51-58, 62, 63, 67, 70, 71, and 75; and Deposition of Dr. Kenneth A. Azar, pp. 56, 57, and 58. The admitting and treating physicians at each hospital noted that Cy had made a suicide attempt and that he posed an imminent danger to himself. Deposition of Dr. Ronald W. Maris, pp. 13 and 23; Deposition of Dr. Harold Morgan, pp. 26, 27, 51, and 52; Deposition of Dexter C. Poss, Sr., p. 88; and Deposition of Myra Lee Bush, p. 47. Cy Poss was involuntarily committed to Georgia Regional Hospital at Augusta that evening at approximately 10:45 p.m. Deposition of Dr. Robert B. Gottschalk, pp. 63 and 64.

On the morning of October 16, 1984 at approximately 7:30 a.m., respondent psychiatrist Kenneth A. Azar arrived and interviewed Cy Poss. Deposition of Dr. Kenneth A. Azar, p. 82. Within the first half hour after respondent Azar had first met Cy, Respondent Azar took Cy off suicide precautions and reached the preliminary opinion that Cy had not attempted suicide, was not depressed, and would not need treatment there as an inpatient. Deposition of Dr. Kenneth A. Azar, pp. 88 and 89. At approximately 9:00 a.m., Cy's father Dexter C. Poss, Sr. arrived at Georgia Regional Hospital, whereupon respondent Azar spoke with Dexter Poss, Sr. and then again spoke with Cy with Dexter present. Deposition of Dr. Kenneth A. Azar, pp. 90, 100, and 104. Then, at approximately 10:30 a.m., despite the objections of the father, without checking any other outside source of information, and in the face of the information which had prompted the involuntary commitment hours before, respon-

dent Azar informed Dexter Poss, Sr. that Cy would be released from Georgia Regional Hospital. *Id.* at 112; Deposition of Dexter C. Poss, Sr., pp. 72-74; *please see also* Appendix J, *infra.*

Shortly afterward on October 16, 1984 at approximately 12:30 p.m., the police again took Cy into custody after he had been involved in a minor fender-bender. R9-180, 257. Respondent Swan observed then that Cy's appearance and conduct was consistent with someone who had been without sleep in a drugged or dazed condition. R9-257 and 258. Cy was taken to the McDuffie County/Thomson City jail facility and he was shortly thereafter released. *Id.* Sheriff Swan then ordered Cy to be arrested again because he considered Cy to be a danger to himself. R9-261 and 273. However, Sheriff Swan did not inform the officer who assisted Swan with the arrest or the jail personnel that Cy had attempted suicide the day before and was a suicide risk. R9-106-110, and 264. Cy was neither searched immediately before or monitored during his brief second incarceration in the McDuffie County/Thomson City jail facility. R9-104 and 105.

The McDuffie County/Thomson City jail facility had a history of jail suicides, which Sheriff Swan had failed to address by any written policy or specific training for managing arrestees and inmates known to be suicide risks. R-237 through 245, 247, and 256

At approximately 2:00 p.m. on October 16, 1984, roughly twenty-four hours after his first suicide attempt and within a few minutes after being placed in a jail cell at the McDuffie County/Thomson City facility, Cy removed a pistol he had placed behind his back and inflicted the gunshot wound to his head from which he later died. R9-107 and 108, 263.

Standard of Scope of Review

The standard for the scope of review of the district court's grant of respondent Kenneth A. Azar, M.D.'s motion for summary judgment and motion to dismiss is whether based on all the evidence "there is no genuine issue as to any material fact and that the moving [party is] entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In order to make such a determination, the district court must view the evidence in a light most favorable to the non-movant. *Osterneck v. E.T. Barwick Industries, Inc.*, 79 F.R.D. 47 (N.D. Ga. 1979).

The standard for the scope of review for the district court's grant of respondents McDuffie County's and Sheriff Swan's motion for a directed verdict under F. Rule Civ. P. Rule 50 is the same standard on appeal as it was for the trial court. *Alman Bros. Farms & Feed Mill, Inc. v. Diamond Lab, Inc.*, 437 F.2d 1295 (5th Cir. 1971). The standard itself is whether the evidence is sufficient to create an issue of fact for the jury. In determining whether the evidence is sufficient, the district court is not free to weigh the evidence, to pass on the credibility of the witnesses, or to substitute its judgment of the facts for that of the jury. *Id.* Additionally, it must view the evidence most favorably to the party answering the motions made and must give that party the benefit of all reasonable inferences from the evidence. *Id.*

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Below Regarding A Government Physician's Federal Qualified Immunity Is In Conflict With The Decisions Of This Court, The Decisions Of Other Circuits, And Other Decisions Of The Eleventh Circuit Itself.

This Court has consistently held that a government official, whether a physician or otherwise, may only avail himself of federal qualified immunity when "his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L.Ed. 2d 396, 102 S.Ct. 2727 (1982) [hereinafter cited as *Harlow*]. In conferring federal qualified immunity upon respondent Azar, however, the lower court *completely omitted any consideration* of the Fourteenth Amendment rights of an involuntarily committed patient as established by case law at the time as well as the most critical facts which were in evidence before it.[1]

---

[1] Though the lower court did recognize *Harlow* was applicable, it failed to follow the guidance *Harlow* provides. In essence, the *Harlow* decision converted the partly subjective standard of good faith qualified immunity into a purely objective test which turns on whether the applicable law was "clearly established at the time an action occurred." *Harlow* at 818. Thus, beyond the basic contours of the case created by the material facts in dispute, no other circumstances are relevant to the issue of federal qualified immunity other than the *objective reasonableness of the official's conduct measured with reference to clearly established law*. And most importantly for the purpose of this petition, on a motion for summary judgment or motion to dismiss, "a court ordinarily *must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party* [emphasis provided]." *Harlow* at 816, n. 26. Moreover, as an affirmative defense, the government defendant's burden of proof should be heightened where there are matters

Contradicting the *Harlow* standard which uses the state of the law at the time of the incident as the primary point of reference, and running crossgrain to a record replete with the expert testimony of a nationally preeminent suicidologist and a board certified forensic psychiatrist, the district court granted respondent Azar's motion for federal qualified immunity, holding that "[t]he [petitioners] have countered the [respondent's] evidence of objective reasonableness only with argument, conclusion and contentions [emphasis provided]."[2] Appendix C, Order of March 25, 1988.

Petitioners respectfully submit that not only is the lower court's analysis of federal qualified immunity flawed by departing from the *Harlow* standard and considering matters other than the state of the law at the time of the constitutional deprivation, but the lower court's ruling is also inescapably in error when viewed in the light of the substantial evidence in the record which amply rebutted respondent Azar's contentions of objective reasonableness and which created material facts in dispute for resolution by a jury.[3]

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of constitutional proportions and other questions of significant public importance. *Guglielmoni v. Alexander*, 583 F. Supp 821 (D. Conn. 1984) [hereinafter cited as *Guglielmoni*].

[2] *See* Appendix J; Citations to Record of Material Facts in Dispute Regarding Claims Against Respondent Azar.

[3] Though respondent Azar never challenged this action by asserting that his conduct was not taken under color of state law or did not reflect the policy of that government hospital facility, for the sake of clarity, Azar's position as the Chief Medical Officer of the North Unit of Georgia Regional Hospital conferred upon him policy making authority for the treatment of involuntarily committed patients there. Deposition of Kenneth Azar, pp. 19-21. As such, his acts and omissions "may fairly be said to represent official policy" and constitute custom, making him liable for such constitutional violations." *Monell v. Department of Social Services*, 436 U.S. 658, 694, 56 L.Ed 2d 611, 98 S.Ct. 2018 (1978) [hereinafter cited as *Monell*]; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 498, 89 L.Ed. 2d 452, 106 S.Ct. 1292 (1986) [hereinafter cited as *Pembaur*].

First, as to the state of the law at the time of constitutional deprivation, the defense of federal qualified immunity is not available to respondent Azar in a Section 1983 action because at the time of Dexter C. Poss, Jr.'s death, the law clearly established *the right of an involuntarily committed patient in a government facility to reasonable and adequate medical care under the Fourteenth Amendment*. At least since 1982, two years before the death of petitioners' decedent, the Supreme Court unequivocally held that such Fourteenth Amendment rights do not have to be triggered by the instigation of criminal proceedings, *but that involuntary commitment in a state facility is more than sufficient to give rise to the well recognized Fourteenth Amendment right to adequate medical care as well as to safe hospital conditions*. *Youngberg v. Romeo*, 457 U.S. 307, 73 L.Ed.2d 28, 102 S. Ct. 2452 (1982) [hereinafter cited as *Youngberg*]; *see also O'Conner v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Society For Goodwill To Children, Inc. v. Cuomo*, 737 F.2d 1239 (2d. Cir. 1984).

> We recognize that the State concedes a duty to provide adequate food, shelter, clothing, and *medical care*. *These are the essentials of the care that the State must provide*. The State also has the unquestioned duty to provide *reasonable safety* for all residents and personnel within the institution. [Emphasis provided.]
>
> *Youngberg* at 324; *see also Goodman v. Parwatikar*, 570 F.2d 801 (8th Cir. 1978).

As to whether the aforestated rights to adequate medical care for the involuntarily committed are at least as great as the rights of those charged or convicted of crimes, the Supreme Court clearly stated that "[p]ersons who have been involuntarily committed are *entitled to more considerate treatment and conditions of confinement* than criminals whose conditions are designed to punish [emphasis provided]." *Youngberg* at 321 and

322. Thus, not only does *Youngberg* unequivocably establish the Fourteenth Amendment right of those involuntarily committed in government facilities to adequate medical care, but also it makes the pellucid point that such care must rise at least to standards set by legal decisions involving those confined for criminal reasons.

Following *Youngberg*, and prior to the death of petitioners' decedent, the courts had recognized that there is "no sound underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart." *Guglielmoni* at 826, *quoting Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977). This rather commonsense principle has been cited with frequency throughout the circuit courts with favor.

> A serious medical need may exist for psychological or psychiatric treatment, just as it may exist for physical ills. A psychological or psychiatric condition can be as serious as any physical pathology or injury, especially when it results in suicidal tendencies. And just as a failure to act to save a [person] from suffering from gangrene might violate the duty to provide reasonable medical care absent an intervening legitimate government objective, failure to take any steps to save a suicidal [person] from injuring himself may also constitute a due process violation under *Bell v. Wolfish* [439 U.S. 816, 58 L.Ed.2d 107, 99 S.Ct. 76 (1979)].
>
> *Partridge v. Two Unknown Police Officers Of Houston*, 751 F.2d. 1448, *withdrawn*, 755 F.2d. 1126, *substituted opinion*, 791 F.2d 1182, 1187 (5th Cir. 1986), *citing Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir.); *Bee v. Greaves*, 744 F.2d 1387, 1395 (1984), *cert. denied*, 105 S.Ct. 1187, 84 L.Ed.2d 334 (1985); *Inmates of Allegheny County Jail v.*

Pierce, 612 F.2d 754, 763 (3rd Cir. 1979); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977).

In a case with facts that are strikingly similar to the ones at bar, the Eleventh Circuit reversed a grant of summary judgment to a physician who had assumed a policy making role at a government hospital and had discharged a patient who also posed an imminent risk of harm to himself. *Morrison v. Washington County, Alabama*, 700 F.2d 678 (11th Cir. 1983) [hereinafter cited as *Morrison*]. Like the petitioners' decedent, the patient in *Morrison* also died for lack of adequate medical care in a county jail shortly after being perfunctorily discharged by the defendant physician. In its discussion of the policy responsibilities of government physicians under a Section 1983 claim, the *Morrison* court noted that:

> A list of essential functions of a hospital would have to include policies and procedures for the admission and discharge of its patients. *Hospitals are not hotels* [emphasis provided]. Someone must necessarily make a decision in accord with an established standard or criteria . . . It is not merely the fact of discharge, but the manner of discharge which is at issue... While the decision concerning [the patient's] discharge involved [the physician's] mental processes, the circumstances and fact of the discharge are at issue.
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> *Morrison* at 682-684; *see also Rogers v. Evans*, 792 F.2d 1052 (11th Cir. 1986); and *Waldrop v. Evans*, 681 F. Supp. 840 (M.D. Ga. 1988).

Under the objective test used by the *Harlow* court, and in light of the *Youngberg* decision as well as its progeny, respondent Azar is not entitled as a matter of law to cloak himself with federal qualified immunity in defense of his duty as a

policy making government physician to provide adequate and reasonable medical care to involuntarily committed patients. Stated simply, a reasonable person acting as a policy making government official should have known that his conduct which demonstrated more than mere negligence — whether that is gross negligence, conscious indifference, reckless indifference, deliberate indifference,[4] intentional ill will, or actual malice with regard to an involuntarily committed patient's serious medical needs, may run up against the shoals of that patient's Fourteenth Amendment rights.

Second, even if matters other than the state of the law at the time of the constitutional deprivation are considered for federal qualified immunity purposes, there was a gracious abundance of evidence in the record upon which a jury could conclude not only that the acts and omissions of respondent Azar missed the mark of being objectively reasonable, but also that said failure of respondent Azar to provide even minimal medical care plummeted far below mere negligence.[5] *This is not a case where there is any reasonable doubt that the petitioners' decedent was suicidal. See* Appendix J, *infra.* In fact, short of an intentional tort, it is difficult to imagine a situation so com-

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[4] "Deliberate indifference exists when action is not taken in the face of a strong likelihood, rather than a mere possibility, that failure to provide care would result in harm..." *Guglielmoni* at 826; *cited with favor in Edwards v. Gilbert*, 867 F.2d 1271 (11th Cir. 1989); see also *Daniels v. Williams*, 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986) [hereinafter cited as *Daniels*].

[5] Among other evidence submitted, the petitioners filed with the district court and referred in their brief to the depositions of two preeminent experts in the fields of suicidology and psychiatry, Dr. Ronald W. Maris and Dr. Harold C. Morgan. As to the material facts in dispute, these experts testified in great detail and under vigorous cross-examination by respondent Azar's counsel that respondent Azar's acts and omissions with regard to the treatment of Cy Poss were not objectively reasonable.

pletely bereft of basic psychiatric care where an involuntarily committed suicidal patient exhibits all the red flags of medical emergency and the government physician makes the deliberate decision to ignore them and to refuse treatment.[6]

The district court maintained that the crucial question for federal qualified immunity as applied to this case is: "*given all the facts available to him at the time*, did Azar act with objective reasonableness in discharging the deceased?" Appendix C, Order of March 25, 1988. Though petitioners have noted the flaw in this purely factual pre-*Harlow* type of analysis for federal qualified immunity purposes, even when using that specific question as a starting point, there remains a long litany of material facts in dispute that amply rebut any contention of objective reasonableness. This is particularly true when respondent Azar's acts and omissions are viewed in the context of the *availability, reliability, and substance* of the *primary* sources of information upon which his decisions were based.

Availability of Information. Concerning what information was available during the time of Cy Poss's involuntary commitment and treatment at Georgia Regional Hospital, there was a plethora of readily available primary sources of critical medical data — family (parents, grandmother, aunt, and uncle), friends (former girlfriend and employer), police officers (City of Thomson and County of McDuffie), and medical personnel (former psychological counselors, family doctor, ambulance personnel, McDuffie County Hospital personnel, and V.A. Hospital personnel).

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[6] It is important to note that the broad administrative framework of O.C.G.A. §§ 37-7-43, 37-7-64, and 37-7-91 (1981) regarding discharge procedures do not dictate the parameters of objective reasonableness for the purpose of a federal section 1983 claim. They have nothing to do with this aspect of petitioners' action. Petitioners do not contend that the above state code sections

Despite the abundance and availability of the above information, respondent Azar deliberately chose not to investigate any of those sources with two exceptions — the patient's father and the few pages of medical records (not at that time complete) which had arrived by then from McDuffie County Hospital and the V.A. Hospital. Both of these sources *expressly* stated that *Cy Poss had attempted suicide, was suicidal, and should be involuntarily committed*. Respondent Azar then deliberately chose to ignore the only two independent sources of information he or his subordinates had bothered to consult. By his own admission, respondent Azar conceded that *"[t]he big issue being a conflict between what [Cy Poss] was telling us and the information we were getting from the family and from the other doctors, written information, and there was a large discrepancy* [emphasis provided]." Deposition of respondent Kenneth A. Azar, p. 84.

Reliability of Information. As to the reliability of the information respondent Azar did use, it is critical to note that the *sole* primary source of data upon which respondent Azar based his diagnosis, treatment, and discharge decisions was the very patient whom he briefly counseled for suicidal ideations and mental disorder. It is also worthy to note that any concurrence respondent Azar may have enjoyed from his subordinates at Georgia Regional Hospital on this matter was merely based

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either channeled respondent Azar into performing some constitutionally impermissible act or eroded his obligation to provide reasonable and adequate medical care to his involuntarily committed patient. Respondent Azar's medical dereliction was done "under color of state law" as a government official with policy making authority, but it was in no way mandated by state law. Nothing in the aforementioned state code sections directed respondent Azar to terminate Cy Poss's hospitalization at that time and to prematurely discharge him without the medical treatment he was involuntarily committed there to receive.

upon the same single source respondent Azar chose to rely on and these observations of his subordinates should not be used to artificially broaden the base of primary information to which respondent Azar had limited himself. Moreover, whatever those secondary observations were of his subordinates, respondent Azar as chief psychiatrist in charge of the unit would still be professionally responsible for those functioning under his direction in a case for which he had directly assumed responsibility.

More specifically, respondent Azar had every reason to believe, and in fact believed at the time, that the single source of information he chose to depend on was highly unreliable. First, all other primary sources of information contradicted Cy Poss on his suicidal ideations. *See* Deposition of respondent Kenneth A. Azar, p. 84. Second, respondent Azar knew Cy Poss wanted desperately to be released from the hospital, and that he was extremely afraid of and adverse to confinement. *Id.* at 56-58, and 100; *see* Deposition of Robert B. Gottschalk, pp. 51-54, 62, 63, 67, 70, 71, and 75-77. Third, respondent Azar knew Cy Poss had a personality that was capable of and would attempt to conceal suicidal ideation to effect his desired release. *See* Deposition of respondent Kenneth A. Azar, pp. 98-100; and Deposition of Robert B. Gottschalk, pp. 90 and 100.

Substance of Information. The seminal fact of this case, which traditionally creates a watershed in Section 1983 actions involving the Fourteenth Amendment rights of patients or inmates who pose suicide risks, is that the petitioners' decedent was actually *involuntarily committed for attempting to take his own life* hours before respondent Azar terminated the hospitalization and released the patient in the face of every reasonable indication to the contrary. This overarching piece of information, in addition to all of the critical data petitioners note

with specificity in Appendix J, was readily available to respondent Azar at the time in question.[7]

In what would be a radically new and alarming precedent for federal qualified immunity analysis, the lower court has held that the material facts in dispute should be limited only to the information that "[respondent] Azar knew at the time of the discharge decision..." Appendix C, Order of March 25, 1988. Along this vein, respondent Azar has argued that he should not be held accountable even for information directly bearing on the suicidal state of his patient which was readily available and which he deliberately chose not to obtain.

It is axiomatic that a policy making government physician should not be able to circumvent the Fourteenth Amendment rights of an involuntarily committed patient by simply deciding to look the other way. *A state of civil rights law to the contrary would obviously foster a legal climate inviting government physicians to abnegate their responsibility in ostrich fashion and thereby create their own immunity, even where the facts that they do have before them mandate further inquiry for their patient's welfare.* This is particularly true in the instant case where, but for respondent Azar's own rather self-serving post mortem characterization of his brief discussion with the patient just prior to release, respondent Azar himself concedes that every other source of primary information he had bothered to consult indicated his patient had made a suicide attempt hours before and posed

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[7] Each material fact listed in Appendix H was placed in evidence either directly through lay testimony or was incorporated through the petitioners' experts' testimony at the time the district court granted respondent Azar federal qualified immunity. Any objections respondent Azar may have wished to raise to the admission of the petitioners' experts' opinions was waived by respondent's failure to object at the first use of said deposition as it was so stipulated at the time of their taking.

an imminent threat to himself. *See* Deposition of respondent Kenneth A. Azar, p. 84.

To summarize, because the state of the law at the time of Cy Poss's death clearly established the right of an involuntarily committed patient to reasonable and adequate medical care in a government facility, and because there was ample evidence in the record upon which a jury could reasonably conclude that respondent Azar's conduct as a policy making government psychiatrist went well beyond the pale of objective reasonableness, petitioners respectfully request that this Court grant this petition to review the lower court's order granting respondent Azar federal qualified immunity.

II. The Decision Of The Court Below Regarding A Government Physician's State Immunity Is In Conflict With The Decisions Of The Georgia Supreme Court.

The lower court's decision conferring state governmental immunity under O.C.G.A. § 37-3-4 (1981) upon respondent Azar stands in sharp relief against the background of opposing decisions of the Georgia Supreme Court.[8]

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[8] It is noteworthy that respondent Azar at the trial level did not assert the two defenses of *federal qualified immunity* and *state governmental immunity* in the same motion. This is critical because, under the circumstances of this case, the requisites for each are mutually exclusive. On one hand, and as more fully noted in section I of this petition, in order for respondent Azar to prevail on a defense of federal qualifed immunity, he must *inter alia* prove that *some medical treatment was provided* during Cy Poss's involuntary commitment at Georgia Regional Hospital at Augusta. On the other hand, as discussed further in this section of this petition, to prevail on a defense of state codified governmental immunity, respondent Azar must show that *no medical treatment was involved* after the overnight admission and before the

First, the state governmental immunity for a psychiatrist in Georgia is wholly unavailable where the suit is brought by or on behalf of the patient himself. In the recent case of *Jackson v. Miller*, 176 Ga. App. 220, 335 S.E.2d 438 (1985), the court reversed a summary judgment granted to a government employed physician who claimed state government immunity through his official status with the hospital. "[A physician's] primary duty in this instance being to his patients rather than to the state or the city, we hold that he is not entitled to claim governmental immunity by virtue of the fact that he was employed by a public clinic." *Id.* at 221, *cited with favor in Swofford v. Cooper*, 184 Ga. App. 50, 360 S.E.2d 143 (1987), *affirmed Cooper v. Swofford*, 258 Ga. 149 , 368 S.E. 2d 518 (1988).

Second, the state governmental immunity provision of O.C.G.A. § 37-3-4 (1981) is entirely inapplicable to a suit involving the inadequacy of medical treatment. *Swofford v. Cooper*, 184 Ga. App. 50, 360 S.E.2d 629 (1987), *affirmed Cooper v. Swofford*, 258 Ga. 149 , 368 S.E.2d 518 (1988). The codification of Georgia's governmental immunity for physicians at O.C.G.A. § 37-3-4 (1981) is limited to the narrow administrative guidelines set forth for the admission and discharge procedures for psychiatric patients. *Id.*

The gravamen of this action is not whether respondent Azar deviated from the letter of Title 37 of the Georgia Code, and petitioners certainly do not contend Cy Poss's death was

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subsequent discharge. The assertion of these two types of immunities are inescapably inconsistent. In short, there are substantial material facts in dispute as to whether the cursory counselling that Cy Poss received prior to his release evidenced some medical treatment, but was so grossly inadequate for a known suicide risk that it violated his Fourteenth Amendment right to reasonable medical care as an involuntarily committed patient in a government facility. As such, not only is it irrational for respondent Azar to be shielded by both immunities due to their mutually exclusive nature, but also it makes

caused by respondent Azar's obligatory observation of those administrative procedures. The matter to be decided for the pendant state tort claims is whether respondent Azar's failure to properly treat the serious medical needs of young Cy Poss fell below the duty he owed his patient *during the time Cy was under respondent Azar's care*. Quite simply, O.C.G.A. § 37-3-4 (1981) does not contemplate its use by a physician to purge himself for the perfunctory discharge of a patient with serious medical needs.[9]

Third, even if the pendant tort claims were not brought on behalf of the patient (which they were) and did not address the inadequancy of treatment (which they did), the Georgia Supreme Court's ruling in *Martin v. Georgia Dept. of Public Safety*, 257 GA. 280, 357 S.E.2d 569 (1987) should have been dispositive of the issue. In that case, the very type of insurance coverage held by respondent Azar was deemed to waive all of that official's immunity, both of the general case law variety and of that codified at O.C.G.A. § 40-6-6 (1981) for police in emergency situations.[10]

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no sense for either immunity to be available to respondent Azar as a matter of law because of the material facts in dispute.

[9] In fact, it was the opinion of respondent's own counsel that the application of this specific code section with regard to a peace officer only immunized him for his actions "taken in good faith, upon reasonable grounds, *and in a non-negligent manner* [emphasis provided]." 1969 Ga. Att'y Gen. No. 69-49, *construing* O.C.G.A. § 37-3-4 (1981); *See also Martin v. Georgia Dept. of Public Safety*, 257 Ga. 280, 357 S.E.2d 569 (1987), *construing* O.C.G.A. § 40-6-6 (1981).

[10] Because respondent Azar have asserted various claims to state governmental immunity, it is necessary for the purpose of this petition to be more precise in discussing them. The primary substantive distinction between sovereign and official immunity is made in Georgia on the basis of whether the state bears exclusive liability for the action or whether it is shared or born entirely by the named official personally. *Hennessy v. Webb*, 245 Ga. 329, 264 S.E.2d

In short, because the court of last resort in Georgia has clearly spoken on the inapplicability, unavailability, and waiver of any state governmental immunity for respondent Azar, petitioners respectfully request this Court grant a writ of certiorari to review the lower courts' decision on this issue. However, if this court finds the state governmental immunity issue raised by the pendant tort claims have not been definitively answered by the Georgia courts, and this issue requires answers from the Georgia Supreme Court on questions of Georgia substantive law, then out of an abundance of caution petitioners respectfully request that this Court grant this petition to review the lower court's order denying cerification to the Georgia Supreme Court in accordance with Rule 37 of that court.

III. The Decision Of The Court Below Regarding The Burden Of Proof For A Constitutional Deprivation Is In Conflict With The Decisions Of This Court, The Decisions Of Other Circuits, And Other Decisions Of The Eleventh Circuit Itself.

In granting respondent Swan's motion for directed verdict, the district court held there could only be an unconstitu-

878 (1980) [hereinafter cited as *Hennessy*]; *see also Cooper v. Swofford*, 258 Ga. 149, 368 S.E.2d 518 (1988).

Additionally, while the source of sovereign immunity may be found in common law, that is not the case with official immunity. *Hennessy*. At common law, public officials were held personally liable for their torts. *Id*. Through both case law and statute in Georgia, official immunity has been created for those discretionary acts which are by their nature nonministerial and within the authority of the official. *Id*. Thus, *categorizing an immunity as statutory or non-statutory tells something about its source, but reveals absolutely nothing about its substance and its scope*. This is particularly true with regard to official immunity which, as mentioned, is an outgrowth of both sources. As

tional deprivation where there existed an indifference to an inmate's serious medical needs *"rising to the level of deliberate indifference, which means almost purposeful, not caring about something* [emphasis provided]."[11] R9-390. With this heightened and incorrect definition of deliberate indifference in mind, the lower court held in essence that for conduct to evidence a constitutional deprevation, then it must not only rise above mere negligence, as required in *Daniels*, but it must also converge in a purposeful type of deliberate indifference. Applying this novel intentional tort type of standard to the instant action, the district court went on to state that such a reasonable inference of deliberate indifference could not be drawn from the evidence presented at the close of petitioners' case. *Id.*

After misconstruing the appropriate burden of proof for a constitutional deprivation, the lower court aggravated and perpetuated this error by addressing only one of petitioners' civil rights claims against respondent Swan, by discounting earlier incidences of respondent Swan's failure to institute precautions for suicide risk, and by employing the inappropriate standard even when considering in isolation the events immediately surrounding the death of Cy Poss.

First, petitioners' claims were not based exclusively upon the Fourteenth Amendment allegations regarding Cy Poss's right to reasonable and adequate care, but also were based upon his Fourth Amendment right to reasonable arrest. Particularly because Cy Poss was not being arrested for a crime according to respondent Swan (R9-261), but was instead being placed in

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a result, the lower court's determination that the state immunity in question cannot be official immunity because it has a statutory source is entirely meaningless. *See* Appendix C, Order of March 25, 1988.

[11] It is important to note initially that respondent Swan did not contest the petitioners' allegations that Swan's acts and omissions were taken under "color of state law" or that said actions of Sheriff Swan reflected the official policy

protective custody, the manner in which he was arrested and the precautions taken at that time should have reflected that special relationship and higher duty of care. *Patterson v. Fuller*, 654 F. Supp. 418 (N.D. Ga. 1987) [hereinafer cited as *Patterson*]. In this regard, there was ample evidence upon which a reasonable inference could be drawn that respondent Swan's failure to take the appropriate measures during the arrest went substantially beyond the pale of mere negligence and, at the very least, evidenced a strong likelihood that harm would result to petitioners' decedent. *Id.*; *Owens v. City of Atlanta*, 780 F.2d 1564 (11th Cir. 1986); *Colburn v. Upper Darby Township*, 838 F.2d 663 (3rd Cir. 1988); *Matje v. Reis*, 571 F.Supp. 918 (S.D. Ohio 1983).

Applying the specific facts of this case to the Fourth Amendment claim of unreasonable arrest, though *respondent Swan knew Cy Poss had attempted suicide less than twenty-four hours before, knew Cy Poss was a high suicide risk and knew an arrest would be likely to ignite an already volatile situation because of Cy Poss's fear of confinement*, respondent Swan nonetheless instructed his subordinates to arrest Cy Poss, failed to inform the other arresting officers or the jail personnel that Cy Poss was a high suicide risk, failed to take Cy Poss directly to a hospital for treatment or to instruct the other arresting officers to do so, failed to search Cy Poss for a dangerous instrumentality at the time of arrest or to instruct the other arresting officers to do so, failed to search Cy Poss for a dangerous instrumentality at the time Cy Poss was placed in jail or to instruct the jail personnel to do so, and failed to monitor Cy Poss at the jail or instruct others to do so. R9-261 through 268. Additionally, there is evidence in the record indicating the atmosphere surrounding Cy

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of respondent McDuffie County. Moreover, respondent Swan did not contend that he was entitled to some form of federal qualified immunity due to an uncertain state of the law at the time of Cy Poss's death.

Poss's arrest was that of anger between Swan and one of the officers involved, stemming from the Sheriff's desire to establish his authority over the subordinate officer. R9-106 through 114.

Second, it is the central purpose of a Section 1983 suit to deter and, if possible, eradicate civil rights violations which are manifested by governmental policy, whether that policy is a longstanding pattern and practice or the single act of an official with policy-making authority. *Monell*; and *Pembaur*. This action contains both types of constitutionally impermissible policy.

As the official whose actions dictated the County's policy for arrestees and inmates, respondent Swan had failed repeatedly to take effective measures to prevent suicide in the McDuffie County/Thomson City shared jail facility. There existed a longstanding and pervasive indifference to the serious medical needs of inmates who posed suicide risks. In the recent history of the jail facility prior to Cy Poss's death, there had been at least four prior successful suicides as well as other incidences of suicide attempts and self-mutilation — all of which reflected respondent Swan's failure to properly keep dangerous instrumentalities out of the jail cells and to properly monitor inmates who were suicide risks. R9-241 through 245. There was no written policy at all with regard to searching those arrested and incarcerated. R9-247. Additionally, prior to Cy Poss's death, there was little evidence of any policy, whether instituted through training, supervision, or otherwise, for specifically managing inmates who were known to be suicide risks. R9-247 and 256. All of the above omissions were compounded by a jail facility which was shared by the County of McDuffie and the City of Thomson, creating dangerously blurred lines of authority and wide gaps of responsibility that contributed to several inmates' suicides prior to Cy Poss's death. R9-237 through 240.

The fact that precautions were not previously taken by respondent Swan and were not in place at the time of Cy Poss's medical emergency, regardless of whatever intentions the respondent Sheriff may state he had at the very instant of Cy Poss's arrest, does not make the petitioner's deceased any less the victim of respondent Swan's ongoing indifference to the serious medical needs of arrestees who posed a suicide risk.

Finally, pretermitting the petitioner's claim for the unreasonable means of arrest and excluding *arguendo* respondent Swan's longstanding failure to institute precautions for inmates who were high suicide risks, the respondent Sheriff's acts and omissions viewed in isolation constitute much more than mere negligence. In order to prevail, it is not required that petitioners demonstrate respondent Swan's actions were so egregious they constituted a type of deliberate indifference rising almost to the level of an intentional tort. *Daniels*.

Because the failure to search any arrestee taken into custody is obviously negligence, certainly *the failure to search and monitor an arrestee known to be suicidal creates at the very least a question of fact concerning the strong likelihood of harm.* "If there is ever a case where gross negligence on the part of a governmental official will suffice to prevail on a substantive due process claim, it should be in a case where an individual loses his life." *Patterson* at 425; *See also Colburn v. Upper Darby Township*, 838 F.2d 663 (3rd Cir. 1988); *Partridge v. City of Houston*, 751 F.2d 1448 (1985), *withdrawn* 755 F.2d 1126 (1985), *substituted*, 791 F.2d 1182 (5th Cir. 1986). As such, the lower court should not have required the petitioner to prove respondent Swan's actions constituted deliberate indifference rising to or closely approaching an intentional tort.

IV. The Decision Of The Court Below Regarding The Liability Of A County For The Actions Of Its Official With Final Policy Making Authority Is In Conflict With The Decisions Of This Court, The Decisions Of The Other Circuits, And Other Decisions Of The Eleventh Circuit Itself.

In granting respondent McDuffie County's motion for directed verdict, the district court stated it saw "nothing in this case, apart from normal funding, which would link the Sheriff of McDuffie County, the state official, with respect to a theory of negligence or *respondeat superior*, [to the County of McDuffie]."[12] R9-360. Petitioners have never maintained that their federal civil rights claims in any way rest on a theory of mere negligence or a theory of *respondeat superior*. *Daniels*; *Monnell*; and *Pembaur*.

The lower court's grant of respondent McDuffie County's motion for directed verdict is an absolute aberration in the case law from this Court, other Circuits, and the Eleventh Circuit itself. Recently, a federal court in Georgia has so succiently and squarely addressed this issue on all fours, that it obviates the need for extended argument. "A finding that the County may be held liable for the acts or edicts of the Sheriff [in a section 1983 action] comports with both the opinions of this circuit and the Supreme Court in *Pembaur*. . ." *Johnson v. Bullard*, 644 F.Supp. 333, 337 (N.D. Ga. 1986), *citing also Wilson v. Taylor*, 733 F.2d 1539 (11th Cir. 1984); *Williams v. City of Valdosta*, 689 F.2d 964 (11th Cir. 1982); *see also Anderson v. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985); *Marchese v. Lucas*, 758 F.2d 181 (6th Cir. 1985); and *Carroll v. Wilkerson*, 782 F.2d 44 (6th Cir. 1986).

[12] Essentially, the court ignored its earlier Order of June 25, 1987 denying respondent McDuffie County's motion for summary judgment, which was simply recast as a motion for directed verdict.

In summary, because of the abject lack of authority for the lower court's holding that a county cannot be held liable in a Section 1983 action for the acts of its sheriff, and because all authority known to petitioners is to the contrary, petitioners respectfully request the Court grant a writ of certiorari to review the decision of the lower court.

III. CONCLUSION

For the forgoing reasons, petitioners respectfully pray that a writ of certiorari issue to review the decision of the Eleventh Circuit in this case.

Respectfully submitted,

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July 17, 1989

Appendix A

IN THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DEXTER C. POSS, SR., et al., Plaintiffs	)	CIVIL ACTION FILE NO. 185-130
vs.	)	
GEORGIA REGIONAL HOSPITAL OF AUGUSTA, GEORGIA, et al., Defendants	)	

ORDER

Having reviewed the briefs and heard the arguments from the Defendant McDuffie County and the Plaintiffs concerning Defendant McDuffie County's Motion for Summary Judgment,

It is hereby ordered and adjudged that said motion be DENIED.

SO ORDERED this 25th day of June, 1987.

DUDLEY H. BOWEN, JR.
SOUTHERN DISTRICT OF GEORGIA

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

DEXTER C. POSS, SR., et al., Plaintiffs	)	
	)	CIVIL ACTION
	)	CV185-130
vs.	)	
	)	
GEORGIA REGIONAL HOSPITAL OF AUGUSTA, GEORGIA, et al., Defendants	)	

ORDER

The above-captioned case is an action brought pursuant to 42 U.S.C. § 1983 for damages resulting from the death of plaintiffs' son Dexter C. Poss, Jr. Jurisdiction over this action is conferred upon the Court by 28 U.S.C. §§ 1331 and 1343 and by the principles of pendent jurisdiction. Presently before the Court is defendant Georgia Regional Hospital's and defendant Dr. Kenneth A. Azar's motion for summary judgment. A hearing was held on the motion on September 24, 1987, in Augusta, Georgia.

I. FINDINGS OF FACT

The deceased, Dexter C. Poss, Jr. (Cy Poss), was taken to the McDuffie County Hospital on October 15, 1984, after attempting to take his own life by taking an overdose of sleeping pills. After being treated and observed for three and one-

half hours, the decision was made to transfer Poss to University Hospital in Augusta, Georgia. Upon the request of his family, Poss was instead transferred to the Veterans Administration Hospital in Augusta.

Poss was examined at the Veterans Administration Hospital upon his arrival at approximately 9:15 o'clock P.M. A decision was then made to transfer Poss to Georgia Regional Hospital where he was admitted at 10:35 o'clock P.M. Upon admission to Georgia Regional Hospital, Poss was given mental and physical examinations. Dr. Robert Gottschalk, Jr. conducted the mental examination, after which Poss was kept in the hospital overnight. On the morning of October 16, 1983, Dr. Kenneth A. Azar discharged Poss.

After Poss was released, his father carried him back to the younger Poss' apartment in Thomson, Georgia. At approximately 12:00 noon, Cy Poss was involved in an automobile accident in Thomson. He was arrested shortly thereafter and was incarcerated in the Thomson City Jail. Poss was released from the jail, but upon the direction of Sheriff William B. Swan, Poss was subsequently picked up and transported back to the jail. When he arrived back at the jail, Poss was locked in a cell with at least two other prisoners. A short time after being placed in the cell, a shot was fired which resulted in a bullet wound to Poss' head. Poss was transferred to the Medical College of Georgia where he died. A .38 caliber revolver was found in the cell in which Poss was shot.

II. CONCLUSIONS OF LAW

The plaintiffs' action for the wrongful death of Cy Poss is based upon claims of medical negligence and upon 42 U.S.C. § 1983. Defendants Georgia Regional Hospital of Augusta, Georgia ("Georgia Regional") and Dr. Kenneth A. Azar ("Dr. Azar")

(collectively "state defendants") have moved for summary judgment. The state defendants contend that plaintiffs' claims are barred by the doctrine of governmental immunity, and Dr. Azar additionally claims that the plaintiffs' action against him is barred by the statutory immunity conferred under O.C.G.A. § 37-3-4.

Summary judgment should be granted "if there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and demonstrating that there is an absence for its motion, and demonstrating that there is an absence of any dispute as to a material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Also, the moving party may be granted summary judgment if they show the court that there is an absence of evidence to support the non-moving parties' case. *Celotex Corp. v. Catrett*, ___U.S. ___, 106 S.Ct. 2548 (1986). If the moving party makes this showing, then it is entitled to a judgment as a matter of law because the non-moving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. *Id.* at 2553. This Court in ruling on a summary judgment motion must determine whether under the governing law there can be but one reasonable conclusion as to the verdict. *Anderson v. Liberty Lobby, Inc.*, ___U.S. ___, 106 S.Ct. 2505, 2511 (1986). Moreover, a mere existence of a scintilla of evidence in support of the plaintiffs' position is not sufficient to defeat a summary judgment motion; there must be evidence on which the jury could reasonably find for the plaintiffs. *Anderson*, 106 S.Ct. at 1512. All reasonable doubts, however, must be resolved in favor of the party opposing summary judgment. *Casey Enterprises v. American Hardware Mutual In-*

surance Co., 655 F.2d 598, 602 (5th Cir. 1981). When, however, the moving party's motion for summary judgment has pierced the pleadings of the opposing party, the burden then shifts to the opposing party to show that a genuine issue of fact exists. This burden cannot be carried by reliance on the conclusory allegations contained within the complaint. *Morris v. Ross*, 653 F.2d 1032, 1033 (11th Cir. 1981).

A. Plaintiffs' Claim Against Georgia Regional Hospital

The defendant Georgia Regional contends that the doctrine of sovereign immunity bars plaintiffs' claim against it. Sovereign immunity and official immunity are two subcategories of governmental immunity. In this state, sovereign immunity is provided for under Article 1, Section 2, Paragraph 9 of the 1983 Constitution of the State of Georgia. Under this doctrine, which has been recognized since the adoption of the common law, the state and its departments and agencies are immune from liability, unless the immunity is waived. *Hennessy v. Webb*, 245 Ga. 329, 264 S.E.2d 878 (1980). Official immunity exists in this state for those discretionary acts of an officer of the state which are non-ministerial, which are within the scope of the officer's authority, and which are without willfulness, malice or corruption. *Id.* at 330-31, 264 S.E.2d at 880.

One of the ways by which sovereign immunity can be waived is where liability insurance has been provided. Sovereign immunity is waived "as to those actions for the recovery of damages for any claim against the state or any of its departments and agencies for which liability insurance protection for such claims has been provided but only to the extent of any liability insurance provided." 1983 Ga. Const., Art. I, Sec. 2, Para. 9.

In the case *sub judice*, Dr. Azar is covered by a comprehensive general liability insurance policy. The policy provides in pertinent part:

> This policy covers the following: PERSONAL INJURY, BODILY INJURY, SICKNESS, DISEASE OR DEATH AND PROPERTY DAMAGE caused by or resulting from error, omission or negligence *in the performance of duties within the scope of an insured's employment* with a participating entity that has purchased coverage prior to the date of the occurrence.
>
> In consideration of the payment of the appropriate premium, and subject to all of the limitations as set forth in this policy or any addendum hereto, the Fund hereby agrees that it will provide the following coverage:
>
> A) Comprehensive general liability insurance. The Fund will pay on behalf of any insured, all sums which the insured shall become legally obligated to pay as damages, court costs and attorney fees, because of bodily injury, property damage or personal injury resulting from any job related occurrences caused by any insured. The limitation on the Fund's liability under this section shall be as stated in the declarations attached hereto and made a part of this policy; provided, however, where damages are incurred as a combination of bodily injury, property damage or personal injury, all such damages shall be combined in calculating the total liability of the Fund for any one occurrence caused by an insured and the total liability of the Fund

shall not exceed the per occurrence coverage as set forth in the declarations attached hereto.

B) Occupational errors or omissions liability insurance. The Fund will pay on behalf of any insured, all sums which the insured shall become legally obligated to pay as damages, court costs and attorney fees, arising out of the performance of or failure to perform official duties in the insured's capacity as an officer or employee and caused by the insured. The Fund will also pay on behalf of the insured all such sums within the policy limits arising out of the rendering of or failure to render services by any person for whose acts or failure to act such insured is legally responsible by reasons of the insured's position.

Under the terms of the policy, "insureds" are defined as:

1) *Employees* of the State of Georgia, *employed by participating Departments or Agency, at the time of an occurrence covered hereinafter.*

2) All employees of participating Authorities and Instrumentalities of the State of Georgia, for an occurrence hereinafter covered.

3) Board Members designated by participating entities.

4) Elected or appointed members of participating entities.

(emphasis in original)

As this insurance covers any negligent act "arising out of the performance of or failure to perform official duties in the insured's capacity as an officer or employee and caused by the

insured," any liability for Dr. Azar's actions is covered under the terms of the policy. Thus, Dr. Azar's official immunity is waived to the extent of the insurance. *See Martin v. Dept. of Public Safety*, 257 Ga. 300, 357 S.E.2d 569 (1987). As Georgia Regional is vicariously liable for the acts of its employees, the waiver of Dr. Azar's official immunity acts as a waiver of Georgia Regional's sovereign immunity to the extent of the available insurance. Accordingly, defendant Georgia Regional's motion for summary judgment is DENIED.

B. Plaintiffs' Claim Against Dr. Azar.

While the general comprehensive liability insurance policy acts as a waiver of Dr. Azar's official immunity, the defendant Dr. Azar also asserts that he is entitled to the protection of the statutory immunity provided for in O.C.G.A. § 37-3-4. This section provides:

> Any physician, psychologist, peace officer, attorney, or health official, or any hospital official, agent, or other person employed by a private hospital, or at a facility operated by the State, by a political subdivision of the State, or by a hospital authority created pursuant to Article 4 of Chapter 7 of Title 31, who acts in good faith in compliance with the admission and discharge provisions of this Chapter shall be immune from civil or criminal liability for his actions in connection with the admission of a patient to a facility or the discharge of a patient from a facility.

Dr. Azar's actions in discharging Cy Poss are immunized from liability by section 37-3-4. Dr. Azar is a physician employed at a state-operated facility. His discharge of Mr. Poss appears to be in good faith compliance with the applicable

admission and discharge provisions of Title 37, Chapter 3*. In short, Dr. Azar is the type of defendant that this code provision was designed to protect.

The plaintiffs contend that the immunity conferred by section 37-3-4 does not cover Dr. Azar's actions. The statutory provision covers "actions in connection with the admission of a patient to a facility or the discharge of a patient from a facility." The plaintiffs make a valiant effort to create a distinction between Dr. Azar's decision to release Cy Poss from Dr. Azar's medical treatment of Mr. Poss. The plaintiffs claim that the gravamen of their action is not whether Dr. Azar properly discharged the deceased but whether he "properly treat[ed] the serious medical needs of the young Cy Poss. . . ."

Despite their skillfully phrased attempt to create a distinction, no such distinction exists. The plaintiffs' cause of action does rest upon Dr. Azar's release of Mr. Poss. Indeed, the plaintiffs themselves seemed to recognize this fact when they stated, "Plaintiffs' claim of medical negligence center around the hasty decision by Defendant Azar to *release* Cy Poss roughly twelve (12) hours after Cy's initial suicide attempt, despite the overwhelming evidence mandating confinement and without consulting the most obvious readily available sources of critical information." (emphasis supplied) (Plaintiffs' brief in response to the motion for summary judgment, p.2). The coverage provided by section 37-3-4 applies to Dr. Azar's actions.

The plaintiffs also contend that the immunity conferred by section 37-3-4 is a limited codification of official immunity

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* The applicable discharge provisions which relate to the discharge of involuntary patients such as the deceased in this case are O.C.G.A. §§ 37-7-43; 37-7-64; and 37-7-91. No evidence exists to support plaintiffs' claim that Dr. Azar acted in bad faith in compliance with any of these provisions.

and, as such, is waived by the existence of liability insurance on Dr. Azar. I cannot agree.

The statutory immunity conferred by section 37-3-4 is a limited, good-faith immunity which is separate and distinct from official governmental immunity. Section 37-3-4 provides a qualified immunity which immunizes those who act in "good faith compliance with the admission and discharge provisions of [O.C.G.A. Title 37, Chapter 3]." Official governmental immunity, which applies to acts done within the scope of an official's authority, is qualified by the proviso that acts be done "without willfulness, malice, or corruption." *Hennessy*, 245 Ga. at 331, 264 S.E.2d at 880. Section 37-3-4 immunizes only those decisions involving the admission or discharge of a patient from a facility, while the governmental immunity applies to "any suit against an officer or agent of the State, in his official capacity. . . ." *Id.* at 330, 264 S.E.2d at 879. Section 37-3-4 details a limited list of officials to whom the provision applies, while official governmental immunity exists for "officers and agents of the state." Had the Georgia General Assembly chosen to provide means of waiver for the statutory immunity code provision, it could have done so. This Court will not undertake to do that which the legislature has chosen not to. Accordingly, the liability insurance coverage which waived Dr. Azar's official governmental immunity has no waiver effect on Dr. Azar's statutory immunity. There being no genuine issue of material fact, defendant Dr. Azar's motion for summary judgment is GRANTED.

SO ORDERED at Augusta, Georgia, this 3rd day of December, 1987.

DUDLEY H. BOWEN, JR.
UNITED STATES DISTRICT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

DEXTER C. POSS, SR., et al.,	)	
Plaintiffs	)	CIVIL ACTION
	)	CV185-130
vs.	)	
	)	
DEPARTMENT OF HUMAN RESOURCES, et al.,	)	
Defendants.	)	

ORDER

In this case a jury has been selected, and the matter is scheduled to go to trial as soon as it can be scheduled. Currently, there are two questions before the court that should be resolved before trial.

I. ELEVENTH AMENDMENT IMMUNITY OF THE GEORGIA DEPARTMENT OF HUMAN RESOURCES (DHR)

The eleventh amendment bars citizens of a state from bringing suit against their state. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). The defendants claim that the DHR is an arm of the state and there therefore sheltered by the immunity from suit afforded by that amendment. Plaintiffs counter with the argument that, even if the DHR is a state organ, its sovereign immunity has been waived by the state's purchase of liability insurance. Thus, the DHR must meet two criteria

before it can properly claim eleventh amendment protection: first, it must be an arm of the state, and second, it must not have acted to waive the immunity to which that status would normally entitle it.

I think the evidence shows quite clearly that the DHR satisfies the first of these criteria. A governmental entity may be considered to be an arm of the state if it is financially dependent on the state treasury, possesses powers and characteristics consistent with those normally associated with state agencies, and is treated as such by state courts. *See Laje v. R. E. Thomason General Hospital*, 665 F.2d 724 (5th Cir. 1982). *See also Huber, Hunt & Nichols v. Architectural Stone Co., Inc.*, 625 F.2d 23 (5th Cir. 1980). Here, while the DHR receives some funding from the federal government, it is primarily dependent on state funds for its operating expenditures, *see* O.C.G.A. 49-2-10, and as plaintiffs themselves point out, is covered by a state insurance policy. The facts further show that the DHR performs its functions throughout the state according to guidelines and directions specifically prescribed by the state, *see* O.C.G.A. 49-2-6, and has been declared outright by the Georgia Legislature to be "an institution of the state." O.C.G.A. 49-2-5. Finally, the DHR is treated as a state agency by the Georgia Courts. *See, e.g., Department of Human Resources v. Briarcliff Haven, Inc.*, 141 Ga. App. 449 (1977); *Georgia Department of Human Resources v. Demory*, 138 Ga. App. 888 (1976). Unless there has been a waiver, then, the DHR merits eleventh amendment protection from this action.

In this regard, the plaintiffs are mistaken in contending that the state's purchase of liability insurance constituted such a waiver. This is true only with respect to state sovereign immunity; a waiver of eleventh amendment immunity is a separate question. It must be made expressly and without equivocation. *Edelman v. Jordan*, 415 U.S. 641 (1974). It cannot simply be implied from

a waiver of the immunity provided for under state law. *See Florida Dept. of Health & Rehabilitation Services v. Florida Nursing Home Assn.*, 450 U.S. 147 (1981). To accept plaintiffs' argument would be to reduce the eleventh amendment to a redundancy, a mere footnote to various state doctrines of sovereign immunity. I decline to do so. Since the DHR did not waive its *eleventh amendment immunity* by the state's insurance purchase, and since there is no indication that there was ever any *express* waiver, this action is hereby DISMISSED as against the DHR. Fed. R. Civ. P. 12(b) (1).

II. THE QUALIFIED IMMUNITY OF DOCTOR AZAR

There appears to be some confusion over the effect of the court's order of December 3, 1987, in which Doctor Azar's motion for summary judgment on the basis of his qualified immunity from suit was granted. The plaintiffs contend that that order dealt exclusively with their state law causes of action, and not with their federal claim under 42 U.S.C. § 1983. In the interest of completeness, and to allay any uncertainty, I will detail below why Dr. Azar's qualified immunity operates to shield him from this section 1983 action.

In the landmark case of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court announced a new standard for determining when a governmental official's qualified immunity should insulate him from private lawsuits. Thenceforward, a government official performing *discretionary functions* would be immune from such suits as long as his conduct did not violate clearly established constitutional rights of which a reasonable person would have known. *Harlow* at 818. Rather than a determination of the official's subjective good faith, *Harlow* demands that court's limit their inquiry to the issue of the official's "objective reasonableness" in acting as he did, with a view toward encouraging resolution of such disputes at the summary judg-

ment stage. *Id.* Thus, Dr. Azar, as a government official performing discretionary functions, could be amenable to suit under section 1983 only if there were evidence tending to show that he did not act with "objective reasonableness" in discharging the deceased (Dexter C. Poss) from his care.

The evidence shows the following facts to be uncontroverted. Dr. Azar first talked to the deceased on the day after Poss' admission as a patient at Georgia Regional Hospital. He had been advised by another physician, who had already examined Poss, that Poss' condition probably did not merit further confinement. He then discussed Poss' case with a nurse and a second fellow physician. The latter also advised that Poss be released. Dr. Azar then spoke to both Poss and his father. Poss indicated his desire that he be released. Finally, after once again consulting Dr. Rojas, Dr. Azar made his decision to order Poss discharged. In doing so, he abided in good faith by the relevant state statutory procedures governing the admission and discharge of mental patients. O.C.G.A. §§ 37-7-43; 37-7-64; and 37-7-91.

The plaintiffs do not properly refute any of this. Their evidence is not directed at what Azar knew at the time of the discharge decision but at what they apparently feel he *should* have known. For example, they state that Azar should have retained Poss as an incarcerated patient because Poss "would say anything to be released"; because he was "facing imminent criminal charges relating to a dishonored check"; because Poss had a close friend who had committed suicide; and because Poss had told other people of his plans for another suicide attempt. I do not think these allegations and the others like them contained in plaintiffs' brief go to the crucial question in this *Harlow* analysis: *given all the facts available to him at*

the time, did Azar act with "objective reasonableness" in discharging the deceased?

My conclusion is that he did. Given the advice he received from physicians familiar with Poss' case and the range of information available to him from his own examination, I believe that Doctor Azar has shown that he acted as any reasonable person in his capacity would have acted under the circumstances. The plaintiffs have failed to produce any reliable evidence to the contrary, apparently in the mistaken belief that *Harlow* requires omniscience from public officials, rather than simply reasonableness. The plaintiffs have countered the defendants evidence of objective reasonableness only with argument, conclusion, and contentions.

This conclusion is buttressed by the unique nature of Dr. Azar's job. There are few positions in government as discretionary as that held by Azar. A physician relies every day on his own professional judgment, the free and unhampered exercise of which is absolutely essential to the smooth operation of the health-care system. It seems to me that it was precisely such positions that the Supreme Court most desired to protect by pronouncing the *Harlow* test. In fact, the court specifically noted the dangers of placing undue shackles on the professional judgment of state physicians in *Youngberg v. Romeo*, 457 U.S. 307 (1982), decided only a week before *Harlow*. The *Youngberg* ruling stated that such medical judgments are "presumptively valid" and can give rise to liability only if they represent "such substantial departure(s) from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg*, at 323. Frankly, I do not see how the plaintiffs can make this showing here. In fact, I think that the court's previous finding, that Azar was acting in good faith in order-

ing Poss' discharge, *mandates* a ruling that he was exercising his professional judgment in keeping with the *Youngberg* standard. In view of this circumstance, and mindful of *Harlow's* admonition to resolve controversies of this sort on summary judgment, I consider the defendants' motion to have been meritorious.

Dr. Azar retains his official immunity from liability under section 1983. So that there will be no further confusion, let me repeat that Dr. Azar is no longer a defendant in this case in any capacity. All causes of action are hereby DISMISSED as to him.

ORDERED ENTERED at Augusta, Georgia, this 25th day of March, 1988.

DUDLEY H. BOWEN, JR.
UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

DEXTER C. POSS, SR., et al.,	)	
Plaintiffs	)	CIVIL ACTION
	)	CV185-130
vs.	)	
	)	
DEPARTMENT OF HUMAN RESOURCES, et al.,	)	
Defendants	)	

ORDER

Plaintiffs have asked the court to reconsider its orders of December 1, 1987, and March 25, 1988, or in the alternative, to certify an interlocutory appeal of those orders to the Eleventh Circuit Court of Appeals. I decline to take either of these steps at this late date, with trial scheduled to begin on Monday, April 18th. Once that trial is concluded, plaintiffs will have ample opportunity to appeal all of the court's dispositions should they so choose. Accordingly, plaintiff's motion for reconsideration is hereby DENIED.

ORDERED ENTERED at Augusta, Georgia, this 15th day of April, 1988.

DUDLEY H. BOWEN, JR.
UNITED STATES DISTRICT JUDGE

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

DEXTER C. POSS, SR., Individually and as Administrator and Personal Representative of the Estate of DEXTER C. POSS, JR., Deceased, and MARY JO POSS, Individually	)	JUDGMENT IN A CIVIL CASE
vs.	)	CASE NUMBER CV185-130
COUNTY OF McDUFFIE, GEORGIA, and WILLIAM B. SWAN, Sheriff of McDuffie County, Georgia	)	

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Court's Conclusions of Law granting a DIRECTED VERDICT in favor of the defendants COUNTY OF McDUFFIE, GEORGIA, and WILLIAM B. SWAN, Sheriff of McDuffie County, Georgia, and in accordance with the order granting summary judgment in favor of certain other defendants; the

plaintiffs DEXTER C. POSS, SR., Individually and as Administrator and Personal Representative of the Estate of DEXTER C. POSS, JR., Deceased, and MARY JO POSS, Individually, shall take nothing, and that the defendants recover of the plaintiffs their costs in this action.

APPROVED:

DUDLEY H. BOWEN, JR., JUDGE

April 27, 1988
Date

HENRY R. CRUMLEY, JR.
Clerk

LINDA J. FLANDERS
(By) Deputy Clerk

Appendix F

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

DEXTER C. POSS, SR., et al.,	)	
Plaintiffs	)	CIVIL ACTION
	)	CV185-130
vs.	)	
	)	
DEPARTMENT OF HUMAN RESOURCES, et al.,	)	
Defendants	)	

ORDER

Having reviewed the arguments and briefs of all parties concerning plaintiffs' Motion to Subsitute parties,

It is hereby ordered and adjudged that said motion be GRANTED *nunc pro tunc* as of the date of the March 7, 1988 hearing for same, substituting the defendant Georgia Department of Human Resources for the defendant Georgia Regional Hospital, and that plaintiffs be allowed under Fed.R.Civ.P. Rule 6(b) to use a copy of the original summons for service upon the substituted party.

ORDER ENTERED at Augusta, Georgia, this 25th day of May, 1988.

DUDLEY H. BOWEN, JR.
UNITED STATES DISTRICT JUDGE

Appendix G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-8381

DEXTER C. POSS, SR., Individually and as Administrator and Personal Representative of the Estate of DEXTER C. POSS, JR., Deceased, and MARY JO POSS, Individually,

Plaintiffs-Appellants,

versus

KENNETH A. AZAR, M.D., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

Before KRAVITCH and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

BY THE COURT:

Appellants' motion to certify a question of state law to the Supreme Court of Georgia is DENIED.

Appendix H

Do Not Publish

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 88-8381

D.C. Docket No. 85-130

DEXTER C. POSS, SR., Individually and as Administrator and Personal Representative of the Estate of DEXTER C. POSS, JR., Deceased, and MARY JO POSS, Individually,

Plaintiffs-Appellants,

versus

KENNETH A. AZAR, M.D., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

(April 17, 1989)

Before KRAVITCH and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

Appendix I

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-8381

D.C. Docket No. 85-130

DEXTER C. POSS, SR., Individually and as Administrator and Personal Representative of the Estate of DEXTER C. POSS, JR., Deceased, and MARY JO POSS, Individually,

Plaintiffs-Appellants,

versus

KENNETH A. AZAR, M.D., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

---

(April 17, 1989)

Before KRAVITCH and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

"Costs taxed against plaintiffs-appellants."

Judgment Entered: April 17, 1989

For the Court: Miguel J. Cortez, Clerk

By: David Maland
Deputy Clerk

ISSUED AS MANDATE: MAY 8, 1989

APPENDIX J

Citations To Record Of Material Facts In Dispute Regarding Claims Against Respondent Azar.

1. Patient *had just attempted suicide* by drug overdose less than twenty-four hours before Respondent Azar released him; Patient was involuntarily admitted at Georgia Regional Hospital at Augusta for being a danger to himself less than twelve hours before Respondent Azar released him; and Patient met for the first time with and was briefly counseled by Respondent Azar less than three hours before Respondent Azar decided to release him. [Patient rendered brain dead from a self-inflicted gunshot wound less than three hours after Respondent Azar refused treatment and released patient from Georgia Regional Hospital]. Deposition of Dr. Ronald W. Maris, pp. 11, 25, 80, and 87; Deposition of Dr. Harold Morgan, pp. 21, 22, 31, and 50; Deposition of Dexter C. Poss, Sr., pp. 18, 23, 26, 31, 72, and 88; Deposition of Myra Bush, pp. 10-15, 22, and 38; Deposition of Jean Hill Smith, pp. 23, 46, 60, and 61; Deposition of Jack Garrison, pp. 46 and 52; Deposition of William Swan, pp. 25, 26, 28, 29, 36, 46, and 70; and Deposition of Dr. Kenneth A. Azar, pp. 60 and 80.

2. Patient had been *previously seen by a psychiatrist* for counseling who Respondent Azar did not attempt to contact prior to Patient's release. *See* Deposition of Dr. Harold Morgan, p. 46; Deposition of Mary Jo Poss, p. 46; and Deposition of Dexter C. Poss, Sr., p. 37.

3. Patient had *expressed a clear suicidal ideation* and intent to at least four people concerning his first attempted suicide hours before his release. *See* Deposition of Dr. Ronald W. Maris, pp. 12, 15, 17, 19, 23, 24, 72 and 80; Deposition of Dr. Harold

Morgan, pp. 21 and 22; Deposition of Dexter C. Poss, Sr., pp. 30, 31 and 88; Deposition of Myra Bush, pp. 21 and 22; Deposition of Jean Hill Smith, pp. 23, 24, 55, 60, 61, 62, and 70; Deposition of William Swan, p. 29; and Deposition of Dr. Kenneth A. Azar, p. 80.

4. Patient had expressed a *specific plan for a second attempt* at suicide and Respondent Azar knew he had a gun available. *See* Deposition of Dr. Ronald W. Maris, pp. 12, 17, 23, 24, and 38; Deposition of Jean Hill Smith, p. 15; and Deposition of Dr. Kenneth A. Azar, p. 114.

5. Patient was experiencing a *sleeping disorder*. *See* Deposition of Dr. Ronald W. Maris, pp. 12, 15, and 80; Deposition of Dexter C. Poss, Sr., p. 17; and Deposition of Dr. Robert B. Gottschalk, p. 79.

6. Patient was *deeply depressed*. *See* Deposition of Dr. Ronald W. Maris, pp. 15, 19, 44, 56, and 80; Deposition of Dr. Harold Morgan, p. 41; and Deposition of Dr. Robert B. Gottschalk, p. 79.

7. Patient had had family and girlfriend relational troubles, was living alone, was *isolated*, and had no proper professional support in place upon release. *See* Deposition of Dr. Ronald W. Maris, pp. 12, 24, 30, 31, 46, 80, and 82; Deposition of Dr. Harold Morgan, pp. 31, 40, and 49; Deposition of Dexter C. Poss, Sr., p. 46; and Deposition of Dr. Kenneth A. Azar, pp. 95 and 96.

8. Patient was *facing imminent criminal charges* relating to a dishonored check and incarceration for same. *See* Deposition of Dr. Ronald W. Maris, pp. 46 and 80; Deposition of Dr. Harold Morgan, pp. 27 and 31; Deposition of Myra Bush, pp. 26, 27, and 28; Deposition of Dr. Robert B. Gottschalk, p. 81; and Deposition of Dr. Kenneth A. Azar, p. 97.

9. Patient was *desperately afraid of incarceration* and confinement. *See* Deposition of Dr. Ronald W. Maris, pp. 27, 88, and 98; Deposition of Dr. Harold Morgan, pp. 27 and 31; Deposition of Dexter C. Poss, Sr., pp. 36 and 60; Deposition of Mary Jo Poss, pp. 45 and 49; Deposition of Myra Bush, p. 16; Deposition of Jean Hill Smith, pp. 27 and 60; Deposition of Dr. Robert B. Gottschalk, pp. 76 and 85; and Deposition of Arthur Green, p. 47.

10. Patient had a close relative and *friend who recently committed suicide* through drug overdose, and patient was greatly disturbed by his cousin's suicide. *See* Deposition of Dr. Ronald W. Maris, pp. 63, 64, and 80; Deposition of Dr. Harold Morgan, p. 31; Deposition of Dexter C. Poss, Sr., pp. 31 and 46; and Deposition of Jean Hill Smith, pp. 14, 21, and 54.

11. Patient was *diagnosed as suicidal* the day of the initial suicide attempt by other physicians prior to being examined by Respondent Azar. *See* Deposition of Dr. Ronald W. Maris, pp. 13 and 23; Deposition of Dr. Harold Morgan, pp. 26, 27, 51, and 52; Deposition of Dexter C. Poss, Sr., p. 88 ; and Deposition of Myra Bush, p. 47.

12. Patient had had an *erratic educational and work history*. *See* Deposition of Dr. Ronald W. Maris, pp. 12, 15, 19, 56, 63, and 80; Deposition of Dexter C. Poss, Sr., pp. 43 and 44; Deposition of Myra Bush, p. 8; and Deposition of Dr. Robert B. Gottschalk, p. 78.

13. Patient had to be *forcibly brought* by several police officers to the admission unit of Georgia Regional Hospital, and he suffered various bruises and contusions as a result of the struggle. *See* Deposition of Dr. Harold Morgan, p. 26; Deposition of Dexter C. Poss, Sr., p. 25; Deposition of Myra Bush, pp. 16 and 17; Deposition of Dr. Robert B. Gottschalk, pp. 51, 52, 53, 54, 62,

63, 67, 70, 71, and 75; and Deposition of Dr. Kenneth A. Azar, pp. 56, 57, and 58.

14. Patient was in a *hostile mood at time of discharge. See* Deposition of Dr. Ronald W. Maris, p. 24.

15. Patient appeared to be *dazed, disoriented, and still under the effects of his drug overdose* at the time of his release. *See* Deposition of Dr. Ronald W. Maris, p. 95; Deposition of Dexter C. Poss, Sr., pp. 31, 66, and 75; Deposition of Myra Bush, p. 40; Deposition of Jean Hill Smith, pp. 32, 33, 36, 38, 44, 58, 59, 61, 63, 64, 65, 66, 67, and 68; Deposition of William Swan, pp. 29, 31, 33, and 71; Deposition of Dr. Robert B. Gottschalk, p. 95; and Deposition of Arthur Green, pp. 25, 29, 33, and 41.

16. Patient *would try or say anything to be released* from Georgia Regional Hospital, regardless of his suicidal intentions. *See* Deposition of Dr. Ronald W. Maris, p. 16; Deposition of Dr. Harold Morgan, pp. 32 and 43; Deposition of Dexter C. Poss, Sr., pp. 30, 66, and 72; Deposition of Dr. Robert B. Gottschalk, pp. 75, 76, and 77; and Deposition of Dr. Kenneth A. Azar, p. 100.

17. Patient demonstrated *problems with alcohol and drug use. See* Deposition of Dr. Harold Morgan; Deposition of Myra Bush, pp. 50 and 52; Deposition of Jean Hill Smith, pp. 19, 36 and 73; Deposition of William Swan, p. 58; and Deposition of Dr. Kenneth A. Azar, pp. 86, 98, and 113.

18. Patient *demonstrated post-nonfatal suicide attempt catharsis. See* Deposition of Dr. Ronald W. Maris, p. 24; Deposition of Dr. Robert B. Gottschalk, pp. 79 and 88; and Deposition of Dr. Kenneth A. Azar, p. 85.

19. Patient exhibited and was diagnosed by Dr. Azar himself as *having a personality disorder commonly associated with suicide. See* Deposition of Dr. Ronald W. Maris, pp. 6, 16, 27, 37, and 46; Dr. Harold Morgan, pp. 27, 43, 55, 56, and 58; Deposition of Dr.

Robert B. Gottschalk, pp. 98 and 100; and Deposition of Dr. Kenneth A. Azar, p. 98.

20. Patient's *father objected vigorously to the patient's release. See* Deposition of Dr. Harold Morgan, p. 50; and Deposition of Dexter C. Poss, Sr., pp. 32, 72, and 74.

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No. 89-106

In The

Supreme Court of the United States

October Term, 1988

DEXTER C. POSS, SR., Individually and as Administrator and Personal Representative of the Estate of DEXTER C. POSS, JR., Deceased and MARY JO POSS, Individually,

Petitioners,

vs.

KENNETH A. AZAR, M.D.
WILLIAM B. SWAN, SHERIFF, COUNTY OF MCDUFFIE, GEORGIA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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August 31, 1989

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page

Alman Bros. Farm Feed & Mill vs. Diamond Labs, Inc., 437 F.2d 1295 (1971) 7

Anderson vs. City of Atlanta, 778 F.2d 678 (11th Cir. 1971) 6

Bradberry vs. Pinellas County, 789 F.2d 1513 (11th Cir. 1986) 6

City of Oklahoma vs. Tuttle, 471 U.S. 808, 1055 S.Ct. 2427, 85 L.Ed.2d 791 (1983) 6, 7

Daniels vs. Williams, 474 U.S. 327, 106 S.Ct 662 (1986) 5

Monell vs. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) 6

5 Moore Federal Practice 7

42 USC 1983 ..... 5, 6, 7, 8

STATEMENT OF THE CASE

This is an attempt to appeal a per curiam affirmance, without opinion, by the Eleventh Circuit and Court of Appeals.

This case came on to be tried before the Court and a jury on April 18, 1988. At the close of the evidence by the Petitioners, the Respondents County of McDuffie, Georgia and William B. Swan, Sheriff, made a Motion for Directed Verdict. This Motion was granted on April 19, 1988. Judgment was entered thereon on April 27, 1988 which was affirmed by the Eleventh Circuit on a per curiam affirmance, without opinion, on April 17, 1989.

Respondents County of McDuffie County, Georgia and William B. Swan, Sheriff, agree with the Petitioner's Statement of the Case except that the following facts should be added:

That after the Decedent was released from the Regional Hospital he was returned to Thomson, Georgia by his father (Petitioner) and left at his apartment (R9-176). Subsequent to that time, Decedent was involved in an auto-bus accident and was arrested by the City of Thomson Police Officers, Green and Newsome. (R9-94). He was taken into custody and released on bond (R9-94) at the request of Petitioner.

Respondent Swan saw and observed the Decedent at this time and suggested that Green and Newsome keep him in custody (R9-258). After the incident Swan went to the High School where Decedent had been (R9-281) (R9-259) to see the Assistant Principal. It was at this time that Swan determined that the Decedent was unstable (R9-259). Officer Newsome of the City of Thomson was

with the Sheriff. They determined that Green had the Decedent in the car and was taking him home, however, the Sheriff, intending to do what he thought was best, instructed Green to take the decedent to jail (R9-261). When they arrived at the jail, Officers Green and Newsome locked the Decedent up and failed to search him at that time (R9-124-125). Both of these officers were employed by the City of Thomson (R9-125). At the time of the incident in question the Decedent was placed in the City jail by City Officers (R9-125). The City jail and the County jail are in the same building but are separate facilities (R9-118-123) (R9-237-238). The City jail was under the authority of Chief Jack Garrison (R9-125). Seconds after Decedent was placed in the City jail by City police officers, he shot himself with a pistol as a result of the failure of City police officers to search him.

The Respondent Swan was a friend of the Decedent's family. On October 15, 1984, Swan went to the emergency room of McDuffie Hospital with Decedent's aunt and uncle (R9-54). After the incident at the jail, Swan brought the Pastor down to the emergency room. (R9-183). The Sheriff and the Petitioners had a close relationship (R9-273). It was the Sheriff's intent to place the Decedent in protective custody (R9-261). At that time, the Sheriff assumed that the two City Police Officers would search him and not lock him up with a weapon on him (R9-265). At the time that the Sheriff ordered that the Decedent be taken to jail, he was doing what he though was best (R9-266).

On both occasions that the Decedent was taken into custody on October 16, 1984, he was in the custody of the

City of Thomson (R9-276) and was placed in the City of Thomson Jail facility.

The only evidence presented by Petitioners as to the liability of the County of McDuffie was the testimony of Swan which explained the relationship between the Sheriff and the County. In essence this testimony showed that the County merely funded the jail.

SUMMARY OF ARGUMENT

Petitioners seeks a review of a per curiam affirmance without opinion by the United States Court of Appeals for the Eleventh Circuit and of the Trial Courts' grant of Respondent's Motion for Directed Verdict.

A. As to Respondent McDuffie County:

The County of McDuffie is not liable for the acts of the Sheriff. The Sheriff is a constitutional officer of the State and except for funding, the County has no control of the policies of the Sheriff.

In this case, the Petitioners have not shown a willful indifference of the County by the institution of customs or policies which violate the constitutional rights of the Decedent. This is a case of failure to search a prisoner.

In this particular case, the Petitioners have alleged in the Complaint that the County failed to train its officers. Assuming arguendo that the County is responsible for the Sheriff, the County would not be liable as the Sheriff had in place a policy that all prisoners be searched. Further, the incidents herein occurred in the City jail for

which the County had no responsibility. In addition, the search was performed by the City police officers over whom the County had no authority or control nor did the County have a duty to train the City police officers.

B. As to Respondent William B. Swan, Sheriff:

The District Court was correct when it granted the Motion for Directed Verdict of Sheriff William B. Swan. It was the contention of Sheriff Swan that if all of the evidence was construed most favorable for the Petitioners there is not the inference that the acts of Sheriff Swan rose to the level of a deliberate and conscious indifference so as to deprive the Decedent of his constitutional rights through gross negligence or otherwise.

In this case, the evidence shows that the event under investigation occurred almost instantaneously. The event here resulted as a result of ordinary negligence in failing to search a potential inmate. Here, we are not dealing with a result that came as a failure to prescribe suicide precautions and the operation of the jail in so far as caring for the medical needs of inmates. There was in place a policy in both the City jail and County jail to search all prisoners. The incident in this case occurred because two city police officers did not search the Decedent. This was negligence but did not arise to the level of a constitutional tort. In this case, the Sheriff, a close friend of Decedent's family, acted not out of a willful or reckless indifference for the Decedent, but out of a genuine concern for the Decedent.

Respondent, avers that there is no basis in law or fact for any of the petitioner's claim.

Accordingly, the Petition for Certiorari should be denied.

ARGUMENT

Petitioners failed to prove that there was a constitutional deprivation as a result of an official custom or policy of McDuffie County and accordingly the Petition for Certiorari should be denied.

The only evidence presented by Petitioners concerning the relationship between the County and the Sheriff of McDuffie County was through the testimony of Swan (R9-235). Basically, the County provided the funding to the jail and the Sheriff was responsible for the policies, practices and procedures for the operation of his department. He, the Sheriff, is responsible for prisoners in his jail (R9-236). Likewise, the testimony of Swan was that the City jail and the County jail were separate (R9-237). Further, the evidence was that the Sheriff trained his people at the CSRA Law Enforcement Training Center (R9-239). The Sheriff maintains certified jailers (R9-247). There was no evidence presented by the petitioners that the training at the CSRA Law Enforcement Training Center was inadequate or that the jailers were not certified.

Mere lack of due care by a State official does not deprive an individual of life, liberty or property under the Fourteenth Amendment of the Constitution of the United States. *Daniels vs. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986). Accordingly in order for the Petitioners to prevail under 42 USC 1983 they must prove that their Decedent suffered a constitutional deprivation which

resulted from an official custom or policy; *Bradberry vs. Pinellas County*, 789 F.2d 1513 (11th Cir. 1986); *Anderson vs. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985), and when the plaintiff carries the burden of proof that an injury was inflicted as the *result* of a governmental policy or custom then the government would be liable. *Monell vs. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). However, the government cannot be subjected to Section 1983 liability on theories akin to "respondent superior". See *City of Oklahoma vs. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1983). Moreover, in order for the Petitioners to subject the government to liability pursuant to Section 1983, there must be some causal connection between the policy or custom and the constitutional violation alleged.

> "But *Monnell* must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy". At the very least, there must be an *affirmative link between the policy and the particular constitutional violation alleged.*" (Emphasis added).

City of Oklahoma vs. Tuttle, supra, at page 823. See also *Anderson vs. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985).

A Motion for Direct Verdict should be granted in two situations: (1) Where there is a complete absence of pleading or proof on an issue or issues material to the cause of action or defense; or (2) Where there are no controverted issues of fact upon which reasonable men should differ.

The Petitioners have utterly failed to prove that there was a policy or custom of the County which proximately caused the death of their Decedent. Without proof of a custom or policy and some *affirmative link* between the custom or policy of the governing authority and the injury or constitutional deprivation there can be no recovery. *City of Oklahoma vs. Tuttle, supra.* Further there is no showing of a duty on the part of the County to train City employees (Green and Newsome) or to regulate activities in the City jail. As the trial judge observed, virtually the only mention of McDuffie County was that the events occurred in McDuffie County. Therefore, there was a complete lack of proof and the Court was correct in directing a verdict in favor of the County. *Respondent superior theories will not form a basis for recovery under 42 USC 1983.* Consequently, the judgment of the trial court and appellate court should be affirmed.

CONCLUSION

The Standard of Review on the grant of a Motion for Directed Verdict is the same for the Appellate Court as the trial court. *Alman Bros. Farms Feed & Mill, Inc. vs. Diamond Labs, Inc.*, 437 F.2d 1295 (1971). There are two situations in which the Motion should be granted: 1) Where there is a complete absence of pleading or proof of an issue or issues material to the cause of action; or 2) Where there are no controverted issues of fact upon which reasonable men could differ. *5 Moore, Federal Practice,* Sec. 5002 [1] (2d Ed. 1969).

The material issue in this case was whether or not the Petitioners' Decedent had been deprived of his constitutional right to life, liberty or property by an act of the Respondent Sheriff which rose above mere negligence and official custom or policy of Respondent McDuffie County. As to this burden of proof, the Petitioners have failed to prove the violation of a constitutionally protected right. Further, Petitioners have failed to show any official custom or policy of Respondent McDuffie County which proximately caused constitutional deprivation. The Petitioners have also failed to prove that the Respondent Sheriff committed any act that amounted to a "deliberate indifference" to the rights or needs of the Decedent which were constitutionally protected. There are no controverted facts upon which reasonable men can differ. While the failure to each was negligent, such failure committed by City police officers did not constitute a "deliberate indifference" on the part of the Sheriff or McDuffie County so as to impose liability pursuant to 42 USC 1983. Thus, the Judgment of the trial court and the per curiam affirmance without opinion by the Eleventh Circuit should be affirmed as to both of these Respondents regardless, in that the decisions were correct under the standard of review in this case.

Accordingly, the Petitioners prayer for a writ of certiorari to review the Eleventh Circuit decision in this case should be denied by this Honorable Court.

Respectfully submitted,

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Supreme Court, U.S.
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No. 89-106

In The

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October Term, 1988

DEXTER C. POSS, SR., Individually and as Administrator and Personal Representative of the Estate of DEXTER C. POSS, JR., Deceased, and MARY JO POSS, Individually,

Petitioners,

v.

KENNETH A. AZAR, M.D., WILLIAM B. SWAN, SHERIFF, COUNTY OF McDUFFIE, GEORGIA,

Respondents.

RESPONDENT KENNETH A. AZAR'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Fourteenth Amendment to the United States Constitution requires a psychiatrist at a state mental institution to continue the involuntary confinement of a patient for treatment, when in the exercise of the psychiatrist's professional judgment the patient is not mentally ill and not dangerous to himself or others.

II. Whether this Court should review a question of state law which does not implicate a federal question.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 5

I. The Eleventh Circuit's Decision That Dr. Azar Was Not Liable For His Decision To Release Cy Poss From The State Mental Institution Is Consistent With The Decisions Of This Court And Of The Circuit Courts Of Appeals 5

II. This Court Should Not Review Questions Of State Law Which Implicate No Federal Question 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES:

Addington v. Texas, 441 U.S. 418 (1979) 8

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 11

Butner v. United States, 440 U.S. 48 (1979) 11

Butts v. Economou, 438 U.S. 478 (1978)..... 7

Cooper v. Swofford, 258 Ga. 143 (368 S.E.2d 518) (1988) 7

DeShaney v. Winnebago County Department of Social Services, ___ U.S. ___, 109 S.Ct. 109 (1989)..... 6

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 7

O'Connor v. Donaldson, 422 U.S. 563 (1975) 8

Parham v. J.R., 442 U.S. 613 (1979) 8, 10

Pembauer v. City of Cincinnati, 475 U.S. 469 (1986) 11

Pierson v. Ray, 386 U.S. 547 (1967) 11

Roberts v. Grigsby, 177 Ga. App. 377 (339 S.Ed.2d 633) (1985) 7

Vitek v. Jones, 445 U.S. 480 (1980) 8

Wood v. Strickland, 420 U.S. 308 (1975) 7

Youngberg v. Romeo, 457 U.S. 307 (1982) 6, 8

CONSTITUTIONAL AND STATUTORY PROVISIONS:

42 U.S.C. § 1983..... 2

O.C.G.A. § 37-3-4.....2, 10

O.C.G.A. § 37-3-41..... 3

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RESPONDENT KENNETH A. AZAR'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent Kenneth Azar, M.D., respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the decisions of the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This action was brought by Petitioners Dexter C. Poss, Sr. and Mary Jo Poss, against nine defendants seeking damages in connection with the apparent suicide of their son, Dexter Poss, Jr., claiming federal jurisdiction pursuant to 42 U.S.C. § 1983. Petitioners also asserted pendent state claims. Dr. Kenneth Azar, a defendant below, is a psychiatrist at Georgia Regional Hospital at Augusta, a state facility for the mentally ill and one of the hospitals where the decedent was taken prior to his death. Plaintiffs alleged that Dr. Azar was deliberately indifferent to the decedent's serious medical needs and that Dr. Azar failed to exercise ordinary care in connection with the decision to release the decedent from Georgia Regional Hospital. In his Answer, Dr. Azar denied negligence, and he also raised the doctrine of good faith immunity in defense of the § 1983 claim. In defense of the pendent state claims he raised the state law immunity granted to physicians in connection with the discharge of patients from mental institutions. O.C.G.A. § 37-3-4.

On December 3, 1987, the court below granted Dr. Azar's Motion For Summary Judgment, finding that Dr. Azar's discharge of Mr. Poss was in good faith compliance with Georgia's admission and discharge procedures. Order at App. B to Pet. For Cert., p. 9a. Plaintiffs below then filed a supplemental brief containing an argument on the good faith immunity defense raised by Dr. Azar. The Court found that its previous Order acted to dismiss all of the claims against Dr. Azar. Order at App. C to Pet.

For Cert., pp. 17a, 18a. Plaintiffs' Motion For Reconsideration or, In the Alternative, Petition For Certification For Interlocutory Appeal was denied.

After a jury trial was held against the defendants who remained in the case, judgment for those defendants was entered. Plaintiffs appealed to the Court of Appeals for the Eleventh Circuit, which affirmed *per curiam* and without opinion. Plaintiffs then filed this Petition.

STATEMENT OF THE FACTS

On October 15, 1984, Dexter C. Poss was found asleep in his apartment by his grandmother. For the purpose of this Petition it can be assumed that he had taken twenty-five Dalmane tablets with the intention of taking his own life, as was alleged by Petitioners. Later that day, Mr. Poss was taken to Georgia Regional Hospital at Augusta for involuntary admission pursuant to the Georgia Code. O.C.G.A. § 37-3-41.

At approximately 7:00 a.m. the next morning, Dr. Azar conferred with the admitting physician about the patient, and the admitting physician told him that Mr. Poss probably did not meet the criteria which would justify further hospitalization or involuntary detention. Affidavit of Azar, attached to Defendants' Supplemental Brief In Support of Motion For Dismissal. Dr. Azar then reviewed the patient's chart including the patient's history and the mental status exam performed by the admitting physician. He then conferred with the nurse who had attended Mr. Poss and with Dr. Rojas, a resident medical doctor specializing in the field of psychiatry, who had

also examined Mr. Poss that morning. Dr. Rojas advised Dr. Azar that in his opinion the patient was not psychotic, depressed, or suicidal, nor was he overly sedated from medication, and that he did not require further involuntary hospitalization.

Dr. Azar, accompanied by Dr. Rojas, then personally examined Mr. Poss in an effort to formulate his own opinion as to the patient's condition and whether such condition justified continued involuntary hospitalization. Mr. Poss denied ever being depressed or suicidal, but stated he was doing better than he had ever done. Mr. Poss said he felt good about his job and that he had a good future ahead of him. On being questioned by Dr. Azar about having taken Dalmane tablets, Mr. Poss stated he had obtained a prescription for them from his family doctor because he worked at night and he had had trouble sleeping during the day. Dr. Azar also questioned the patient's father and was informed by both the patient and his father that there was no suicide note or any history of prior suicide attempts. The patient insisted that he wanted to be released and stated that if he were detained it would cause him to lose his job.

On completion of his examination of Mr. Poss, Dr. Azar again conferred privately with Dr. Rojas prior to making a final decision as to Mr. Poss' discharge. Dr. Azar and Dr. Rojas both concluded that Mr. Poss' condition did not justify his further involuntary retention. Mr. Poss was released and left Georgia Regional Hospital to return home accompanied by his father.

Later in the day, Mr. Poss was involved in a minor accident and was taken to jail. He was released but was

picked up and returned to jail. A short time after he was placed in a cell, a shot was heard and Mr. Poss was found with a bullet wound to the head. For the purpose of this Petition, it can be assumed that Mr. Poss had shot himself in the head with a gun he had taken on his person into the jail.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS THAT DR. AZAR WAS NOT LIABLE FOR HIS DECISION TO RELEASE CY POSS FROM THE STATE MENTAL INSTITUTION IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OF THE CIRCUIT COURTS OF APPEALS.

A. A PSYCHIATRIST'S DECISION TO RELEASE A PATIENT FROM A STATE MENTAL INSTITUTION, WHEN IN THE PSYCHIATRIST'S JUDGMENT THE PATIENT IS NOT MENTALLY ILL NOR DANGEROUS TO HIMSELF OR OTHERS, DOES NOT VIOLATE THE PATIENT'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS.

Petitioners claim that Cy Poss had a constitutional right to adequate medical treatment which was violated by Dr. Azar's decision to release him from the state mental institution. Although this argument may have an initial appeal, Petitioners' position goes well beyond settled constitutional law. In fact, there is no settled constitutional right for an adult to be held in a state mental institution against his will. None of the cases cited by

Petitioners for this proposition involved a mental hospital's release decision, but rather they all involved minimal conditions of confinement or treatment.

The seminal case finding a substantive due process right to minimally adequate conditions of confinement for the mentally retarded is *Youngberg v. Romeo*, 457 U.S. 302 (1982). The right to adequate medical care found by the *Youngberg* Court, however, is not implicated in this Petition. Petitioners are not challenging the adequacy of the medical treatment their son received while at Georgia Regional Hospital at Augusta. Rather, Petitioners are challenging the decision made by Dr. Azar not to continue to involuntarily hospitalize their adult son, when in Dr. Azar's judgment their son was not mentally ill or retarded and refused to stay. That decision is primarily a medical decision, but it is fundamentally different from the decision to provide one form of treatment as opposed to another once the commitment decision has been made. Under the circumstances of this case, Petitioners had no constitutional right in their son's being involuntarily hospitalized.

Petitioners are asking this Court to significantly expand a state's duty to provide protective services to its citizens. It should be noted that this Court recently has refused to expand the state's duty to provide protective services to an individual under the Due Process Clause. *DeShaney v. Winnebago County Department of Social Services*, ___ U.S. ___, 109 S.Ct. 109 (1989). Furthermore, an expansion of the state's duty to involuntarily commit its citizens would directly and unjustifiably infringe on those citizens' liberty. This case presents no reason for the Court to impose a new duty on the states.

B. EVEN IF IT IS ASSUMED THAT A CONSTITUTIONAL RIGHT TO MEDICAL TREATMENT IS IMPLICATED BY THIS CASE, THE COURTS BELOW PROPERLY DETERMINED THAT DR. AZAR WAS PROTECTED BY OFFICIAL IMMUNITY.

Federal courts have long recognized that governmental officials have a qualified immunity from liability for damages for actions taken within the scope of their discretionary duties and responsibilities. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Butts v. Economou*, 438 U.S. 478 (1978); and *Wood v. Strickland*, 420 U.S. 308 (1975). The *Harlow* Court defined the extent of the immunity as follows:

> . . . governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, supra, at 818.

In Georgia, the decision to discharge a patient from involuntary hospitalization, in addition to being a medical decision, is a state official's discretionary act within the scope of his discretionary authority. *Cooper v. Swofford*, 258 Ga. 143 (368 S.E.2d 518) (1988); *Roberts v. Grigsby*, 177 Ga. App. 377 (339 S.E.2d 633) (1985). In the case before the Court, since Dr. Azar was a state official performing a discretionary function, he is entitled to the defense of qualified immunity. At the time at issue he was a state physician and the Senior Psychiatrist on a unit at Georgia Regional Hospital at Augusta. As stated by the District Court, it is hard to imagine a position requiring

more discretion than the one being challenged here. Dr. Azar could decide to continue the involuntary hospitalization of the patient, with the massive curtailment of the patient's liberty and possible stigma to the patient entailed in that decision. *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *Addington v. Texas*, 441 U.S. 418 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975). Or Dr. Azar could discharge the patient with the risk that the patient may harm himself or others. This is exactly the type of decision to which qualified immunity applies. Thus, the lower court applied the proper standard to determine that Dr. Azar was entitled to the defense of qualified immunity. Order at App. C to Pet. For Cert.

Furthermore, the lower court applied the exact standard that Petitioners are asking that this Court apply. *Youngberg v. Romeo*, 457 U.S. 307 (1982). In defining the standard, the *Youngberg* Court emphasized that the courts must show deference to the judgment exercised by a qualified professional. *Id.* at 321. The Court relied on its previous opinion finding that the professional's judgment regarding hospitalization of the mentally retarded is presumptively valid. *Parham v. J.R.*, 442 U.S. 613 (1979). In *Parham*, a due process challenge to Georgia's procedures for admitting a child to a state mental institution, it was held that Georgia's independent medical decision-making process comported with minimum constitutional requirements. *Id.* The *Youngberg* Court stated that the reason for such deference is to minimize interference by the federal judiciary with the internal operations of the state institutions, and so that the professional personnel are not required to make their decisions in the shadow of an action for damages. *Youngberg, supra*, at 322 and 323. The

Court then enunciated the standard for reviewing such decisions as follows:

> For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323.

Therefore, even assuming that a Constitutional right to medical treatment were at issue in this case, then the lower court applied that standard properly to this case. Thus, there is no conflict between the decision at issue in this case and any decisions of this Court or the Circuit Courts of Appeals.

C. THE LOWER COURT WAS CORRECT IN DETERMINING THAT PETITIONERS' EVIDENCE FAILED TO RAISE A CONSTITUTIONAL ISSUE.

Petitioners urged that the lower court did not weigh the evidence properly and seeks to have this Court reweigh the evidence. This type of argument depends on the very individualized facts of each case and should not be addressed by this Court. Furthermore, the lower court was correct that Petitioners could not show that Dr. Azar failed to exercise his professional judgment in his decision to discharge Petitioners' decedent.

In making his decision Dr. Azar reviewed the available records and consulted with numerous personnel

involved with the patient's care, including the nurse, the admitting physician, and the attending physician. He personally interviewed the patient and the patient's father, at least once individually and also together. Based on this information, and in concurrence with the other two physicians, Dr. Azar formed his opinion that the patient did not meet the statutory criteria for involuntary hospitalization. In particular, Dr. Azar judged that the patient was not mentally ill and not suicidal.

The decision-making approach used by Dr. Azar is very similar to the independent medical decision-making process which is constitutionally adequate. *Parham v. J.R.*, 442 U.S. 613 (1979). Although Petitioners' experts said that Dr. Azar should have had more information on which to base his opinion, there is no settled constitutional law which would require it. Petitioners' main contention seemed to be that based on all the information available to Petitioners in hindsight, Dr. Azar's judgment was wrong. This contention simply does not raise a constitutional issue.

II. THIS COURT SHOULD NOT REVIEW QUESTIONS OF STATE LAW WHICH IMPLICATE NO FEDERAL QUESTION.

Petitioners are seeking review of the lower court's decision on Petitioners' pendent state claim. In that decision the court applied Georgia's statutory immunity to find that Dr. Azar was not liable for his decision to discharge Petitioners' decedent from the hospital. O.C.G.A. § 37-3-4. This Court should not review that decision, because it involves a question of merely state

law which is of no interest to this Court. *Butner v. United States*, 440 U.S. 48, 51 (1979); *see also Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967). This Court generally "accord[s] great deference to the interpretation and application of state law by the Court of Appeals," *Pembauer v. City of Cincinnati*, 475 U.S. 469, 485, N.13 (1986), because "district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective states." *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 500 (1985).

Additionally, the lower court fully considered and correctly decided the issue. The decisions of the Georgia courts, finding that Georgia's doctrines of sovereign and governmental immunity are waived by the purchase of insurance, have never been applied and do not apply to effect a waiver of the immunity granted by a specific state statute to a physician or hospital official making a decision to discharge a patient from a mental institution.

Finally, the Petitioners seek a review of the lower court's decision denying certification of the issue to the Georgia Supreme Court. This question is not of such significance as to warrant review by this Court. Furthermore, Petitioners chose to present their claims in federal court. They should not now be heard to complain because the decision in that court was not to their liking.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

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No. 89-106

In The

Supreme Court of the United States

October Term, 1988

DEXTER C. POSS, SR., Individually and as Administrator and Personal Representative of the Estate of DEXTER C. POSS, JR., Deceased, and MARY JO POSS, Individually,

Petitioners,

v.

KENNETH A. AZAR, M.D., WILLIAM B. SWAN, SHERIFF, COUNTY OF McDUFFIE, GEORGIA,

Respondents.

ON PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

REPLY ARGUMENT 1

TABLE OF AUTHORITIES

CASES PAGES

DeShaney v. Winnebago County Dept. Of Social Services, ___U.S.___, 109 S.Ct. 998 (1989) 2

Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) 1, 2

Morrison v. Washington County, Alabama, 700 F.2d 678 (11th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983) 1, 2

Youngberg v. Romero, 457 U.S. 307 (1982) 2

REPLY ARGUMENT

This petition presents the Supreme Court with an opportunity to address in the context of both a government hospital and a jail facility the burden of proof which is appropriate to demonstrate a constitutional deprivation *after* an individual with serious medical needs is involuntarily committed and incarcerated. Contrary to the contentions asserted in the respondents' briefs, this case has nothing to do with what a government official's duty might hypothetically be before an individual is deprived of his liberty.

In a case also from the Eleventh Circuit whose facts virtually mirror those of the instant action and whose holding squarely supports the position of the petitioners at bar, this Court implicitly recognized the distinction between the custodial and non-custodial obligations of government officials when it denied a writ of certiorari to the government petitioners in *Morrison v. Washington County, Alabama*, 700 F.2d 678 (11th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983) [hereinafter cited as *Morrison*]. *Please see* petitioners' Petition For Writ Of Certiorari, p. 15.

The distinction recognized in *Morrison* was again implicitly confirmed by this Court when it denied a writ of certiorari to the individual petitioners in a case which, unlike the instant action, did not involve the loss of an individual's liberty — a deprivation which necessarily creates a special relationship and thereby triggers certain substantive constitutional rights. *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) [hereinafter cited as *Jackson*]. It is noteworthy that in the dissent to the denial of certiorari in *Jackson*, Justice White and Chief Justice Rehnquist cited the *Morrison* decision

as a case whose holding when compared to the *Jackson* decision and others highlights *"the lack of definitive guidelines for determining when tortious conduct by state officials rises to the level of a constitutional tort* [emphasis provided]." *Jackson*, 465 U.S. at 1051. For that reason, and because " '[no] problem so perplexes the federal courts today as determining the outer bounds of § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983[,]' " Justice White and Chief Justice Rehnquist stated that "[t]his Court should attempt to resolve this 'perplexing' issue..." *Jackson*, 465 U.S. at 1050 and 1051, *quoting Jackson*, 715 F.2d at 1201.

Most recently, this Court has held that the "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint of personal liberty — which is the 'deprivation of liberty' triggering the protections of the Due Process Clause..." *DeShaney v. Winnebago County Dept. of Social Services*, ___U.S.___, 109 S.Ct. 998, 1006 (1989). In the case at bar, the actions taken by the government respondents not only deprived the petitioners' decedent of his liberty, but their actions and representations also precluded treatment from being rendered by other medical facilities from whose care Cy Poss was taken or from being sought by Cy Poss's family elsewhere during the critical period following the initial suicide attempt. *"[T]he substantive component of the Fourteenth Amendment's Due Process Clause requires the state to provide involuntarily committed mental patients with such services as are necessary to insure their 'reasonable safety' from themselves and others* [emphasis provided]." *Id.* at 1005, *citing Youngberg v. Romero*, 457 U.S. 307 (1982).

In summary, for the same reasons cited by Justice White and Chief Justice Rehnquist in *Jackson*, and for the reasons discussed

more fully in the petitioners' earlier brief, the petitioners respectfully request that this Court grant the Petition For a Writ Of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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